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Supreme Court, U.S.

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IN THE  
*Supreme Court of the United States*

OCTOBER TERM 1987

No.

DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida,  
*Petitioner,*

v.

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA  
AND APPENDIX**

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## QUESTIONS PRESENTED

1. Is there a "taking" of private property for public use within the meaning of the Fifth Amendment, when in the furtherance of an emergency program for the eradication of a public nuisance, state agricultural officials destroy "healthy" but "suspect" citrus plants which have been exposed to citrus canker disease?

2. Under the "nuisance exception" to the "takings" clause of the Fifth Amendment, is a court bound by the legislative power of state agricultural officials to declare a nuisance and to require destruction of plants reasonably exposed to a communicable disease, absent a showing that the destruction of the citrus plants was arbitrary and unreasonable?

3. In determining whether destruction of property pursuant to a health and safety regulation is a "taking," must a court first determine whether the regulation bears a reasonable relationship to the public nuisance it is designed to correct, and find a taking only when the regulation is arbitrary and unreasonable, or may the court apply the "balancing test" of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) to weigh the individual losses against the public benefit?

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA**

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The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida, entered in the above entitled proceeding on January 21, 1988, rehearing denied, April 1, 1988.

**OPINIONS BELOW**

The opinion of the Supreme Court of Florida is reported at 521 So.2d 101 and is reprinted in the Appendix hereto, p. A-1, *infra*.

The opinion of the District Court of Appeal, Second District of Florida is reported at 505 So.2d 592, and is reprinted in the Appendix hereto, p. A-10, *infra*.

## JURISDICTION

Petitioner requests review of a judgment of the Supreme Court of Florida in a civil action for inverse condemnation. The court below held that Petitioner, pursuant to its police power, did not have the constitutional authority to destroy healthy but suspect citrus plants without paying just compensation to Respondents.

Pursuant to 28 U.S.C. §1257(3), Petitioner brings this appeal of a "[f]inal judgment or decree" which questions the validity of Article IV, Section 4 of the Florida Constitution, Sections 570.07(21) and 581.031(6), Florida Statutes (1983), and Rules 5BER84-8 and 5BER84-9, Florida Administrative Code, on the ground that they are repugnant to the Constitution of the United States. Jurisdiction of this Court is also invoked to review the final determination by the Florida Supreme Court of Respondents' claim, set forth in paragraph 19 of the Second Amended Complaint, that they are "entitled to recover damages for the unconstitutional taking of their property in the amount of uncompensated value thereof, plus interest."

### *a) The Decision Below Does Not Rest On An Adequate And Independent State Ground*

In reaching this holding, the Florida Supreme Court never expressly addressed the issue of whether its decision was premised on the Fifth Amendment of the United States Constitution which in part provides "nor shall private property be taken for public use, without just compensation" or on Article X, Section 6 of the Florida Constitution which in part provides "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner." Similarly, the Second Amended Complaint, the judgment of the trial court and the opinion of the Second District Court of Appeal do not indicate whether Petitioner's liability arises out of the Fifth Amendment of the United States Constitution or Article X, Section 6 of the Florida Constitution. Moreover, because the Supreme Court of Florida and the Second District Court of Appeal rely upon both

federal and Florida opinions in finding that Petitioner was obligated to pay full and just compensation, there is no indication in the Florida decision that the Florida Constitution provides a bona fide, separate, adequate and independent ground for this decision. In addition, it should be noted that some of the Florida decisions cited in the Florida Supreme Court opinion also rely on this Court's interpretation of the takings clause to determine when the valid exercise of police power stops and an impermissible encroachment on private property begins. See e.g., *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla. 1981), *relying upon*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959), *relying upon*, *Mugler v. Kansas*, 123 U.S. 623 (1887)<sup>1</sup>.

Furthermore, inasmuch as a Florida court may have construed state law narrowly to avoid a perceived conflict with the Fifth Amendment, this Court has jurisdiction to correct a state court's incorrect perception of federal constitutional law where "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984).

b) *The Decision Below Was A Final Judgment Or Decree*

Although the instant case was remanded to the Circuit Court for a trial on the damages owed by Petitioner, the judgment reviewed by the Florida Supreme Court was final for purposes of 28 U.S.C. §1257 under the "pragmatic" approach suggested in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). In *Cox Broadcasting*, *supra* at 482-483, this Court recognized that a judgment may be considered final under 28 U.S.C. §1257 where:

1. Petitioner's position that Article X, Section 6 of the Florida Constitution is not an adequate and independent state ground is fully supported by this Court's ruling in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) that "... when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

“reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come . . . [and] if a refusal immediately to review the state court decision might seriously erode federal policy . . . [and the federal issue] itself has been finally determined by the state courts for purposes of the state litigation?”

In the instant case the federal question — whether the Fifth Amendment guarantee of full and just compensation extends to the destruction of healthy but suspect citrus plants by the Petitioner — has been finally determined by the Florida Supreme Court. In addition, because of the parallel constructions of the Fifth Amendment of the United States Constitution and Article X, Section 6 of the Florida Constitution by Florida courts, reversal of the Florida Supreme Court’s holding would probably preclude further proceedings under both constitutional provisions. As subsequently explained in the Reasons for Granting the Writ, refusal to immediately review the judgment of the Supreme Court of the State of Florida might seriously erode federal policy, and a reversal of this judgment on the federal issue would preclude any further litigation on the “relevant cause of action,” *see, Cox Broadcasting, supra*; therefore the finality requirement of 28 U.S.C. §1257 is satisfied. *See, Goodyear Atomic Corp. v. Miller*, 56 U.S.L.W. 4447, 4448 (U.S. May 23, 1988).

Yet, the granting of certiorari in this case would appear to conflict with the mechanical approach required in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251 (1917) where this Court refused to issue a petition for a writ of certiorari to review a condemnation order entered in an eminent domain proceeding until the Washington Supreme Court had finally reviewed the amount of damages which were to be determined in a subsequent trial. As stated in dicta in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 632-633 (1981), *Grays Harbor Co. v. Coats-Fordney Co.*, *supra*, “has been regarded as a classic example of a decision not reviewable in this Court because it is not ‘final’ [since in] . . . such a case, ‘the remaining litigation may raise other

federal questions that may later come here.' " *quoting from, Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945).

But, *Grays Harbor Co. v. Coats-Fordney Co.*, is distinguishable from this instant case because in the former case plaintiff's theory of liability rested exclusively on the premise that the petition for condemnation was contrary to the Constitution of the United States, while in the latter Respondents have attempted to establish their action for inverse condemnation under the Florida and United States Constitutions. This distinction is significant since in *Grays Harbor Co. v. Coats-Fordney Co.*, a federal question would necessarily be raised in the eminent domain proceeding since as recognized in *San Diego Gas & Electric Co. v. San Diego*, *supra*, 450 U.S. at 633, "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation," *quoting, North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). However, a review of the record in the case *sub judice*, after the Florida Supreme Court filed its opinion on January 21, 1988, clearly reveals that no federal issue was ever raised in the subsequent trial to determine the amount of damages owed to Respondents. *See generally, Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.3 (1981) (where this Court reviewed proceedings in the trial court after remand from the New Jersey Supreme Court to determine the finality issue). In March of 1988, a Pre-trial Order was entered which provided that Petitioner was obligated as a matter of law to pay full and just compensation to Respondents for their losses in accordance with the Constitution of the State of Florida. As a result, at the trial for damages held in March 1988, the damages issue was tried without reference to the Fifth Amendment and the Jury Instructions were based exclusively on the Florida Constitution. Presumably, Respondents failed to pursue their claim under the Fifth Amendment because of Florida's expansive allowance of damages for business losses, costs and attorney's fees under Sections 73.071, 73.091 and 73.092 of the Florida Statutes (1983). Thus, as can be verified from the transcript of the subsequent trial on damages, the federal issue raised in this case is limited to the question of liability, i.e., whether there was

a taking of property within the meaning of the Fifth Amendment, and this issue has been finally determined by the Supreme Court of Florida.

Moreover, the strictly imposed restraints of finality advocated in *Grays Harbor Co. v. Coats-Fordney*, *supra*, should not be mechanically applied since the “considerations that determine finality are not abstractions but have reference to very real interests — not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.” *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948). *See also*, *Budnich v. Becton Dickinson and Co.*, 56 U.S.L.W. 4453, 4454 (U.S. May 23, 1988). Because as explained in the Statement of the Case, the Department is already defending eleven citrus canker cases and since the potential liability of Petitioner to these plaintiffs and other potential plaintiffs may be in excess of \$250 million dollars, any inconvenience and cost of piecemeal review (which is remote because there are no unresolved federal questions pending in this case) is greatly outweighed by the danger of denying justice by delaying this petition on “finality” grounds. Thus, while this court has continued to recognize the principles announced in *Grays Harbor Co. v. Coats-Fordney Co.*, *supra* (see e.g., *San Diego Gas & Electric Co. v. San Diego*, *supra*, 450 U.S. at 632-33), these artificial barriers to finality which are primarily based on concerns that a federal issue will necessarily be raised in the subsequent trial on damages in an eminent domain proceeding are inapplicable and contrary to “the smooth functioning of our judicial system” where it can be demonstrated that no federal issue was raised in the subsequent trial on damages.

#### **UNITED STATES AND FLORIDA CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED**

The Fifth and Fourteenth Amendments of the United States Constitution and Article IV, Section 4 and Article X, Section 6 of the Florida Constitution are reproduced in the Appendix to



this petition (App. p. A-19 - A-21).

In addition, Sections 570.07 and 581.031 of the Florida Statutes and Emergency Rules 5BER84-8 and 5BER84-9 of the Department of Agriculture and Consumer Services are reproduced in the Appendix to this Petition (App., p. A-22 - A-43).

### **STATEMENT OF THE CASE**

In 1984, a virulent and acutely infectious agricultural bacterial strain, commonly known as "citrus canker," was diagnosed in a Central Florida citrus tree nursery. State and Federal regulatory authorities, relying on scientific data and techniques then available, reacted promptly and aggressively by instituting a massive eradication program which ultimately resulted in the destruction of almost eighteen million nursery trees, some actually infected and others exposed to infection. An inverse condemnation suit by two nurserymen whose plants were destroyed and a finding by the Florida Supreme Court that the eradication program was a proper exercise of police power but nonetheless constitutionally compensable, is the basis for this Petition.

Citrus canker is one of the most destructive diseases of citrus and is characterized by extensive damage to the twigs, leaves, and fruit of plants in the family Rutaceae (citrus and citrus relatives). Canker was first identified in the United States in 1913, and first appeared in Florida in 1914. By 1915, the disease was widespread in Florida and the State Plant Board, now known as the Department of Agriculture and Consumer Services, Division of Plant Industry, was created to combat the disease. Over the next 14 years, three million nursery trees and 257,000 grove trees were destroyed at the cost of many millions of dollars. No compensation was paid for plants or trees destroyed. Florida was finally declared free of citrus canker disease in 1927. During this early period, canker also infested Texas, Louisiana, Mississippi and Alabama. In 1947, Texas was the last state to eliminate canker. From 1947 to August 1984, citrus canker did not exist in the United States.

The U.S. Department of Agriculture ("USDA"), and the Florida Department of Agriculture and Consumer Services ("FDACS") have consistently taken strong measures to prevent the reintroduction of citrus canker in Florida. These measures include importation restrictions and domestic quarantines of fruit from countries where citrus canker was found to occur. In 1982, the USDA, Animal and Plant Health Inspection Service ("APHIS") and Plant Protection and Quarantine ("PPQ"), together with cooperating State departments of agriculture (including Florida) adopted an "Action Plan — Citrus Canker Disease" providing emergency measures for implementation in the event of an outbreak of citrus canker.<sup>2</sup> The Plan provided for an eradication program which required immediate destruction of infested plants and defoliation of nearby plants. The approved eradication treatment for nurseries was to destroy all citrus plants at the nursery where an infected host plant was discovered.<sup>3</sup> The action plan also noted that the bacteria seems to be able to survive on branches and bark in a dormant state for several years. The infection spreads over short distances by water splashing and normal farming activities, and over longer distances by movement of infected plants and nursery stock.

The August 27, 1984 discovery of citrus canker at Ward's Nursery in Polk County, Florida was immediately regarded by agricultural officials as a very severe crisis. The Secretary of Agriculture issued a declaration of emergency, effective September 11, 1984 stating:

2. The Plan stated:

"Eradication of an outbreak of citrus canker disease in the continental United States is essential. The eradication program will require the immediate destruction of infected host plants and the use of defoliation to prevent any subsequent infection of nearby plants." USDA, *Emergency Programs Manual*, Part IV.C., "Citrus Canker Action Plan," p. 15 (1982).

3. "In nurseries where an infected host plant is found, all host plants in the nursery will be removed and burned or disposed of in an approved landfill. No citrus or other host plant species will be planted in the nursery for a period of 2 years, provided a grass-free condition is maintained. Otherwise, the interval before replanting is allowed will be 5 years." *Id.* at p. 17.



“Whereas, a serious infestation of citrus canker exists in parts of Florida; and

Whereas, citrus canker is a devastating bacterial disease which rapidly and aggressively infects citrus and which can be spread easily causing catastrophic damage to entire citrus growing areas;

Now therefore, . . . I declare that there is an emergency which threatens the citrus growing industries of this country and I authorize the transfer and use of such sums as may be necessary . . . for the conduct of a program to detect and identify citrus canker infested areas, to control and prevent the dissemination of citrus canker to noninfested areas in the United States, and to eradicate citrus canker wherever it may be found. John R. Block, Secretary of Agriculture.” 49 Fed. Reg. 36421.

The FDACS adopted emergency rules for the eradication of citrus canker on September 19, 1984. These emergency rules found “citrus canker is a highly contagious, infectious, highly destructive pathogen and a public nuisance.” 5BER84-8(10). The emergency rules required the destruction of both infected plants and “suspect” plants. Emergency Rule 5BER84-9(1)(t) defined “suspect citrus canker infested or infected plant” as a plant which has been subjected to infection by its presence in an infested area or having been removed from an infested area within a specified time period. The provisions of the emergency rules which required destruction of Respondents’ trees are as follows:

(4) Infested or infected status of a citrus tree due to its origin from a quarantined nursery or quarantined stock dealer is determined as follows:

(a) All citrus trees from any nursery or stock dealer declared infested or infected since January 1, 1984, are considered as infested or infected and are referred to in this rule as suspect citrus canker infested or infected plants; . . .

(5) Procedures to be followed in nurseries where plants as described as suspect citrus canker infested or infected plants are found:

(a) Destroy by burning or other methods as may be prescribed by the USDA or the department, any plant as described in (4)(a) . . . above.

(b) Destroy by burning or by other methods that may be prescribed by the USDA or the department all citrus plants within 125 feet of the plant described in (4)(a) . . . above."

On September 14, 1984, the USDA issued interim rules prohibiting interstate movement of citrus from Florida. These rules stated that the Deputy Administrator had determined that an emergency existed due to the possibility that citrus canker could be spread to non-infested areas of the United States, and because "a situation exists requiring immediate action to better control the spread of this pest."

The interim rule amended 7 CFR, Part 301 by adding a new sub-part ("Sub-part — Citrus Canker" 7 CFR 301.75) which prohibited movement of fruit from Florida except under a limited permit, which would be issued only under certain circumstances, among which were a determination that the fruit had been treated by a thorough wetting with a chlorine solution. The interim rule prohibited any movement of citrus from Florida to other citrus growing regions of the United States (American Samoa, Arizona, California, Hawaii, Louisiana, Puerto Rico and Texas) 49 Fed. Reg. 36623.

Between September 17, 1984 and October 5, 1984, eight nurseries that had received plants through Ward's Nursery tested positive for citrus canker. A total of 47 nurseries had obtained citrus materials from Ward's Nursery during the months prior to discovery of citrus canker there. The Respondents, Himrod & Himrod Citrus Nursery and Mid-Florida Growers, Inc., were two of the nurseries that received plant materials from Ward's Nursery

but did not test positive for canker prior to the eradication procedures described below.

The Himrod Nursery had received approximately 9,000 budehyes taken from approximately 1,000 budsticks (young twigs) cut from trees at Ward's Nursery in April 1984. These budehyes were grafted onto "seedling liners" (young citrus trees grown from seeds), and placed in a greenhouse in the Himrod Nursery. The Mid-Florida Nursery similarly received approximately 9,000 budehyes from Ward's Nursery, from which it budded approximately 7,500 seedlings. These seedling trees were likewise placed in greenhouses at the Mid-Florida Nursery.

Both nurseries received immediate final orders from FDACS finding that the nursery received citrus trees from a nursery infected with citrus canker, that the Citrus Canker Technical Advisory Committee (established jointly by USDA and FDACS in September 1984) had recommended and the Department had adopted emergency rules requiring eradication of such trees, and that implementation of eradication procedures was necessary at each nursery. The orders required destruction of all plants received from the infected nursery, and all plants within 125 feet of such plants pursuant to 5BER84-9(5). Both orders recited that on September 11, 1984, the U.S. Secretary of Agriculture had issued a declaration of emergency because of citrus canker and contained the following additional findings:

#### "FINDINGS OF IMMEDIATE THREAT

15. . . .In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the

Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.<sup>4</sup>

On October 17, 1984, the U.S. Secretary of Agriculture issued "Declaration of Extraordinary Emergency Because of Citrus Canker." This Declaration stated after finding that a serious infestation of canker existed in Florida:

"Citrus canker constitutes a severe threat to citrus in the United States, and thereby seriously burdens interstate and foreign commerce. Therefore, it is determined that an extraordinary emergency exists because of this outbreak of citrus canker in Florida.

\* \* \*

This declaration of extraordinary emergency authorizes the Secretary to: (1) Seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, in such manner as the Secretary deems appropriate, any product or article of any character whatsoever, or means of conveyance by which the Secretary has reason to believe is infested or infected by, or contains citrus canker; (2) quarantine, treat, or apply other remedial measures to, in such manner as the Secretary deems appropriate, any premises, including articles on such premises, which the Secretary has reason to believe are infested or infected by citrus canker." 49 Fed. Reg. 41268.

After the issuance of this declaration of extraordinary emergency, all of the immediate final orders for destruction of

4. The order was signed on behalf of Doyle Conner, Commissioner of Agriculture by Charles Poucher, Project Director and Gordon Johnson, Deputy Project Director, USDA. The orders were dated October 16, 1984 but the actual destruction of trees commenced October 7, 1984, and was concluded on October 17, 1984.

infected or suspect trees were issued jointly by USDA and FDACS.<sup>5</sup>

On November 21, 1984, the Governor of the State of Florida issued a proclamation convening a special session of the Florida Legislature to address the citrus canker threat and to consider funding methods to alleviate this crisis. The Legislature convened on December 6, 1984 and adopted Chapter 84-457, Laws of Florida, which recognized that citrus canker threatened citrus production in Florida and authorized certain funds to be used to financially assist parties whose citrus trees were lawfully destroyed in compliance with the state-federal eradication program, and made this allocation dependent on federal matching funds. The Act also provided that although the State was not legally obligated to provide compensation and financial assistance to affected growers it would be in the best interest of the State that no person may receive financial assistance from the State unless he releases the State from liability for any losses arising out of the eradication of citrus canker.

After a similar Congressional appropriation, the USDA adopted an interim rule providing for payment of compensation for plants destroyed because of citrus canker. The summary explanation of this rule stated that this action was necessary "in order to obtain cooperation from affected persons in the citrus canker eradication effort in Florida."<sup>6</sup> 50 Fed. Reg. 9261. Both Respondents in this case received compensation from both the State and Federal

5. USDA and FDACS entered into a Cooperative Agreement #12-16-83-023 (Accounting Code 55383-01485) effective as of October 1, 1984 "to further program activities necessary to achieve eradication of citrus canker." By this Agreement, the parties agreed to follow the 1982 Action Plan as providing basic guidance and direction for program activities. The Work Plan attached to the Agreement also required that FDACS destroy infected and exposed trees by burning.

6. The rule established compensation amounts representing 50% of the replacement values of the destroyed plants as determined by the Deputy Administrator, based on information provided by the Citrus Canker Indemnity Work Group (a group composed of representatives of USDA-ARS, USDA-APHIS, the University of Florida, and FDACS) and representatives from the citrus industry. The replacement values of the plants were based on the average costs of purchasing, planting and maintaining the plants.

governments, yet, they estimated that the financial assistance received was only 27 to 30% of "market value."

In 1985, Respondents filed in the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, Florida, an inverse condemnation complaint against FDACS alleging a taking of their property without just compensation. A non-jury trial was held in September 1986, resulting in an "Order of Liability for Taking" dated October 10, 1986, which made the following findings:

"1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.

2. No competent evidence supports the states [sic] concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation."

The Florida Department of Agriculture and Consumer Services appealed this decision to the District Court of Appeal of Florida, Second District, which affirmed the trial court's decision by an opinion filed April 10, 1987. The Court of Appeal discussed state and federal case law concerning police power takings, and, with primary reliance on the U.S. Supreme Court cases of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), held as follows:



"We hold that while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed. The nursery owners must be compensated. We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery. As the United State Supreme Court stated in *Penn Central*, citing to *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), 'the Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Penn Central*, 438 U.S. at 123, 98 S.Ct. at 2659.

While we feel our disposition is correct, because this case involves such an important area of the law and because this malady is likely to revisit us, we certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS POLICE POWER, HAS THE CONSTITUTIONAL AUTHORITY TO DESTROY HEALTHY, BUT SUSPECT CITRUS PLANTS WITHOUT COMPENSATION?" 505 So.2d at 595-6.

The Supreme Court of Florida, by opinion dated January 21, 1988, rehearing denied April 1, 1988 [See *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery*, 521 So.2d 101 (Fla. 1988)]

answered the certified question negatively and therefore affirmed the finding that a taking had occurred and just compensation was required. The Court's opinion states:

"The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court's conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking . . .

The Department next urges that the certified question must be answered in the affirmative because the state, in destroying the trees, validly exercised its police power in conformance with applicable statutes and rules. Although we do not disagree with the Department's contention that the state's order was a valid exercise of its police power, it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking! *See, Albrecht v. State*, 444 So.2d 8 (Fla. 1984). *See also, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3170, 73 L.Ed.2d 868 (1982). As recently stated by the United States Supreme Court, a basic understanding of 'the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. —, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987):' 521 So.2d at 102-103 [Citations omitted except as shown].

1. "We, therefore, also reject the Department's argument that the trial court, in determining the trees were healthy, ignored agency rules which defined the trees as being suspect and subject to destruction and thereby improperly allowed a challenge to the propriety of agency action in an inverse condemnation proceeding. Although the Department correctly contends that the propriety of an agency's action may not be challenged in an inverse condemnation proceeding, Section 253.763(2), Florida Statutes (1983), the fact that the action was authorized pursuant to agency rules does not, as noted above, preclude a determination that the action constituted a taking . . ." 521 So.2d



Chief Justice McDonald dissented from the decision stating:

The conduct of the department should be reviewed in the light of the perceived emergency confronting the department when canker was found. In hindsight it may be that the department overreacted and confiscated property not needed, but a review of the department's actions should not be made on hindsight. The department had the duty to take emergency measures to prevent an immediate harm — the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the Plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation.' 521 So.2d at 105-6.

The Department timely filed a Motion for Rehearing of the Florida Supreme Court decision, suggesting that the Florida Supreme Court had overlooked the recent opinion of this Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. \_\_\_, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), which confirmed the "nuisance exception" to the takings clause. The Motion for Rehearing also suggested that the Florida Court had misapprehended the legal and constitutional principles requiring the judiciary to give deference to a legislative declaration of nuisance, as stated in *Powell v. Pennsylvania*, 127 U.S. 678 (1887), cited with approval in *Keystone Bituminous Coal Association v. DeBenedictis*, *supra* at 94 L.Ed.2d 491. The Motion for Rehearing further suggested that the Court had misapplied *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. \_\_\_, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and that the court had improperly failed to apply *Miller v. Schoene*, 276 U.S. 272 (1927), and *Mugler v. Kansas*, 123 U.S. 623 (1887), reaffirmed in *Keystone Bituminous Coal Association*

*v. DeBenedictis, supra*. The Department also suggested in the Motion for Rehearing that the Florida Court had misapprehended the meaning of "public benefit" versus "public harm" when it failed to use the "reciprocity of advantage" test contained in *Pennsylvania Coal v. Mahon, supra*, 260 U.S. at 415.

The Attorney General of the State of Florida filed a Memorandum in support of the Department's Motion for Rehearing. Rehearing was denied on April 1, 1988. A trial on the damages issue was held, and the Court entered a Final Judgment dated April 26, 1988 in the amount of \$1,943,458.00.

The citrus canker eradication program in Florida resulted in burning of nearly eighteen million trees in 120 nurseries between September 1984 and May 1988. Of these, 30 locations tested positive for canker, and 90 received exposed plant material from nurseries with positive findings. Through January 1988, the State has spent almost \$18 million for eradication of canker, and \$6 million for financial assistance to affected nurserymen. The USDA has spent approximately \$13.5 million for eradication and \$10.5 million for financial assistance.

Many of the affected nurserymen have filed suit. In addition to the instant case which involves only two of the 120 nurseries affected, ten lawsuits are pending in the state or federal courts of Florida; one of these was a class action purporting to represent a class of persons whose trees were burned during the eradication program but the class action allegations were recently withdrawn, and Petitioner anticipates that additional suits, either individual or class, will be filed in the near future. The decision of the Florida Supreme Court in the instant case is being used as precedent in the remaining cases. USDA has been made a party to some of the remaining cases. If the state or USDA is required to pay full compensation for the trees burned, the total damages are expected to exceed \$250 million.

## REASONS FOR GRANTING THE WRIT

THE FLORIDA COURT'S FINDING OF A "TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE IN THE CIRCUMSTANCES PRESENTED (a) FAILS TO RECOGNIZE THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE, and (b) CONFLICTS WITH DECISIONS OF THIS COURT, OF FEDERAL CIRCUIT COURTS OF APPEALS, AND OTHER STATE COURTS OF LAST RESORT.

This case presents the question of whether and under what conditions actions taken by governmental officials for the purpose of protecting public health and safety, specifically for the control, prevention and abatement of a public nuisance, may be considered takings under the Fifth Amendment of the United States Constitution. This case presents a clear opportunity for this Court to distinguish health and safety regulations, or nuisance-type regulations, for which no compensation should be awarded, from land-use regulations which concededly may constitute takings if they "go too far". The Florida Court's decision misapplies the balancing test derived from *Pennsylvania Coal Co. v. Mahon*, fails to recognize the "nuisance exception" to the takings clause, and generally creates an alarming precedent which may effectively restrain governmental officials from responding to current or future crises caused by known nuisances or new diseases of unknown proportions. This case presents an unwarranted extension of this Court's takings jurisprudence, but nonetheless is indicative of the uncertainty and confusion of the law in this area.

The three significant "takings" cases decided by this Court last term<sup>7</sup> have generated much commentary and speculation as to

7. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. \_\_\_\_, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. \_\_\_\_, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Nollan v. California Coastal Commission*, 483 U.S. \_\_\_\_, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

the future course of the Court's takings jurisprudence<sup>8</sup>. State and federal regulatory officials are now facing damages claims for a wide variety of ordinary governmental functions, from land use and zoning regulations to health and safety regulations, such as those involved in the instant case, with no clear guidance as to the dividing line between permissible regulation and unconstitutional takings.

Illustrative of the current dilemma is Executive Order 12630 issued by President Reagan on March 15, 1988, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights." 53 Fed. Reg. 8859. By this executive order, the President, in recognition of the recent Supreme Court decisions and of the need to protect the "public fisc" from undue or inadvertent burdens, directed the Attorney General to promulgate, no later than May 1, 1988, "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," and to disseminate these guidelines to all federal agencies and units of the Executive department no later than July 1, 1988<sup>9</sup>. Concerning public health and safety regulations, the Executive Order states:

"Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and

8. See, e.g., *Peterson Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J., 335 (1988); Simon, *The Supreme Courts 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 U.Fla.J.L. and Pub. Pol'y 103 (1987); Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 Urban Lawyer 389 (1988).

9. As of the date of this petition, the guidelines have not been made public.

be no greater than is necessary to achieve the health and safety purposes.' 53 Fed. Reg. at 8861.

The pragmatic difficulties faced by public health and safety officials are self-evident. Too little regulation may result in insufficient safeguards, and therefore the spread or proliferation of disease, pollution, or unsafe conditions. Innocent citizens affected by the lack of sufficient health and safety regulations may claim that the failure of the responsible governmental agency to adequately protect their property amounts to a taking.<sup>10</sup> Conversely, a conservative approach may result in a court finding, as in this case, of a taking due to over-regulation. The fine line between these points is difficult or impossible to define under the vague and indefinite standards reflected in the Executive Order, which is a direct outgrowth of uncertainties created by recent cases.

The Florida citrus canker crisis presents a clear picture of the results of such a confusing judicial policy. Citrus canker was already known as a devastating disease in this nation and had once been eradicated at great cost. Federal and state regulatory officials, as a cautionary measure, had adopted a contingency plan for eradication of citrus canker if another outbreak occurred, and followed that plan when it did occur. Since canker is spread by invisible bacterial organisms that can be harbored in exposed trees without symptoms for an extended period of time, the eradication

10. This possibility is dramatically presented by a case decided two years before the canker outbreak in Florida, *South Florida Growers Association, Inc. v. U.S. Department of Agriculture*, 554 F.Supp. 633 (S.D. Fla. 1982). In that case, canker had been discovered in limes grown in the State of Colima, Mexico, and the USDA immediately placed an embargo on importation of all citrus plants and fruits from Mexico. Two months later, the USDA modified the embargo by allowing importation of citrus from areas of Mexico other than Colima. A group of Florida citrus growers sought and obtained an injunction requiring public notice and hearings before the embargo could be lifted. The court found that the growers had a property right in the protection of their citrus groves, which could be irreparably damaged by importation of citrus contaminated with canker. The court stated "Failure to provide adequate protection when property is placed in jeopardy by governmental action can amount to an unconstitutional 'taking' of property by destroying it or by exposing it to the risk of destruction. It is this threatening of the Plaintiffs' property right by the governmental action that entitles Plaintiffs to due process." 554 F.Supp. at 637. [citations omitted].

process was deemed to require destruction of both infected and exposed citrus trees.

Through the type of federal-state cooperation demonstrated in the citrus canker eradication program in Florida, a potential disaster of cataclysmic proportions in terms of widespread canker disease in the United States was averted!<sup>11</sup> Nonetheless, catastrophe still looms because the state agricultural agency will be required to pay damages of an unprecedented magnitude, if the decision below stands, for merely seeking to prevent the spread of citrus canker to uninfected areas.

The precedential importance of the decision below cannot be denied. The ramifications extend far beyond the citrus industry to virtually all regulations of animal and plant diseases whereby destruction or quarantine (or even chemical treatment, if that reduces the property value) of infected or exposed plants and animals may be required, and perhaps even to other types of health and safety regulation.

The time has come to draw a clear distinguishing line between health and safety regulations on the one hand, and non-nuisance, land use regulations on the other. This Court, and the highest court of virtually every state in the union has recognized that health and safety regulations adopted in the exercise of the police power, do not amount to takings of private property for public use. This Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887) is recognized as the traditional foundation for this line of cases. In holding that a Kansas statute prohibiting manufacture and sale of intoxicating liquors was not a taking of the Petitioner's brewery, this Court stated:

The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly

<sup>11</sup> Unfortunately, Executive Order 12630 appears to mark the end of federal-state cooperation in these types of programs, due to the potential liability for unanticipated takings.



all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, — equally vital, because essential to the peace and safety of society, — that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' 123 U.S. at 665.

\* \* \*

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.' 123 U.S. at 668-69.

*See also Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878); *Lawton v. Steele*, 152 U.S. 133 (1893); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Consistently, in *Miller v. Schoene*, 276 U.S. 272 (1928) the Court upheld denial of compensation to a person whose red cedar trees were destroyed under a Virginia statute which prohibited keeping red cedar trees which are or may be a source of a communicable plant disease known as cedar rust within a certain radius of any apple orchard. The Court noted that the State Legislature had been forced to choose between protecting one class of property (apple orchards) and another (cedar trees).

“When forced to such a choice, the state does not

exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." [Citations omitted.] 276 U.S. at 279-80.

See also *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

This line of cases, presenting the "nuisance exception" to the Takings Clause, was recognized and reaffirmed by this Court last term in *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*, and was implicitly distinguished from land use type regulatory takings under the rule stated in *Pennsylvania Coal v. Mahon*, *supra*. The majority opinion of Justice Stevens stated: "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." 480 U.S. \_\_\_, 94 L.Ed.2d at 490. The Court rejected the implicit assertion that *Pennsylvania Coal* had overruled those cases which "focused so heavily on the nature of the state's interest in the regulation," referring to the line of cases stemming from *Mugler v. Kansas*, and observed that *Miller v. Schoene* was decided five years *after* the *Pennsylvania Coal* decision. 480 U.S. \_\_\_, 94 L.Ed.2d at 491. The Court said that in *Miller v. Schoene*, it was clear that the State's exercise of its police power to prevent the impending danger of apple rust was justified, and did not require compensation, and that subsequent cases had reaffirmed the important role that the nature of State action plays in the takings analysis.



"The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*.<sup>20</sup> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. [Footnote and citations omitted.] These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 93 L.Ed. 1765, 69 S.Ct. 1434, 7 ALR 2d 1280 (1949). Long ago it was recognized that 'all property in this Country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' *Mugler v. Kansas* . . . , and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."<sup>22</sup> 94 L.Ed.2d at 492.

20. The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity . . . . However, as the current Chief Justice has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." *Penn Central Transport Co.*, 438 U.S. at 145, 57 L.Ed.2d 631, 98 S.Ct. 2646 (Rehnquist, J. dissenting). This is certainly the case in light of our recent decisions holding that the "scope of the 'public use' " requirement of the Takings Clause is 'coterminous with the scope of the sovereign's police powers.' " [Citations omitted.]

22. Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. [Citations omitted.] It is hard to imagine a different rule that would be consistent with the maxim "Sic utere tuo ut alienum non laedas." [Use your own property in such manner as not to injure that of another.] See generally *Empire State Insurance Co. v. Chafetz*, 278 F.2d 41 (C.A. 5 1960). As Professor Epstein has recently commented: "The issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." *Epstein, supra*, at 199."

The Court in *Keystone* did not rest its decision on this factor alone, but held that the petitioner's taking claim also failed because of failure to show a diminution of value sufficient to satisfy that test as set forth in the regulatory takings cases.

The dissent by Chief Justice Rehnquist, joined by Justices Powell, O'Connor and Scalia, also recognizes the "nuisance exception" to the Takings Clause, but differs with the majority as to its scope. 480 U.S. \_\_\_\_, 94 L.Ed.2d at 506. Justice Rehnquist did, however, in the second major takings case decided last term, *First English Evangelical Church of Glendale v. County of Los Angeles*, *supra*, indicate that the finding of a compensable taking in that case may be avoided if the County "establish[es] that the denial of all use was insulated as a part of the State's authority to enact safety regulations,"<sup>12</sup> citing *Mugler v. Kansas*, *supra* and *Goldblatt v. Hempstead*, *supra*. 482 U.S. \_\_\_\_, 96 L.Ed.2d at 262. If the Florida Court was correct in finding a taking in the instant case, then the holding in *First English* implies that there is nothing Petitioner could have done to prevent exposed trees from continuing to spread canker in Florida. If the regulation of healthy but suspect trees is a taking, then a quarantine of exposed trees apparently would have been a temporary regulatory taking for which just compensation would have to be paid.

In the instant case, there has been no direct challenge to the validity of the emergency rules, the statutes under which they were adopted, or the provisions of the Florida Constitution placing such matters within the supervision of the Secretary of Agriculture. The Florida Court implicitly upheld the rules as a proper exercise of the police power and recognized their importance to health and safety objectives, but nonetheless found a taking.

12. The *First English* case did not directly present the question whether the flood regulation was, in fact, a taking but was decided on the assumption made by the California courts that the Complaint sought damages for an uncompensated temporary taking, for which California law provided no remedy. The court addressed only the remedial question. On remand, the California court will have the opportunity to determine whether "nuisance exception" applies to insulate the county from liability. See generally, Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J., 335, 345 (1988).

The writ should be granted in this case to clarify the legal rules applicable to takings claims arising from health and safety regulations. The principles announced in the long line of nuisance regulation cases cited above require that this type of regulation be accorded substantial deference, and that a taking requiring just compensation be found only where the State has acted arbitrarily and unreasonably.<sup>13</sup> This type of analysis would require an initial finding that the regulation or legislation itself exceeds constitutionally permissible bounds and therefore is an invalid exercise of the police power.

The citrus canker regulation requiring eradication of exposed trees in this case was clearly a nuisance type regulation to which the "reciprocity of advantage" and not the balancing test of *Pennsylvania Coal* should be applied. The protection of common agricultural resources is a legitimate State purpose which justifies the destruction of property that is harmful to those resources. There can be no question that the citrus industry of Florida is a vital agricultural resource upon which the livelihood of many Florida citizens depends. See *Sligh v. Kirkwood*, *supra*, 237 U.S. at 60. The citrus industry of Florida had a right to expect the Department to eradicate citrus canker, which threatened all property and economic interests in citrus. Those interests extend far beyond individual nursery or grove owners to those involved in the harvesting, processing, shipping and marketing of citrus fruit and other citrus products, such as, for example, orange juice. The eradication of canker was designed to protect these vital interests. The Florida Court's substitution of its own judgment disrupts this most basic property protection afforded to all of these economic interests by the government's police power.<sup>14</sup>

13. These health and safety types of regulations must be distinguished from land use regulations which, although within the scope of the police power and fully coterminous with the police power, may become takings where the regulation "goes too far" and the interest of justice and fairness require the economic injuries caused by the regulation to be compensated by government. The nuisance exception, however, is not coterminous with the police power, but applies to a limited variety of regulations designed to prevent a property owner, by a noxious use, from injuring his neighbor or the community at large.

14. [Property rights] are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Mugler v. Kansas*, *supra*, 123 U.S. at 663.

The question will never be answered as to whether Respondents' citrus plants would have developed canker, primarily because the State obviated that potential by destroying the trees. Even Respondents' expert witness at trial admitted that he, as a member of the Citrus Canker Technical Advisory Committee, not only voted in favor of, but seconded, the motion to require destruction of trees received from infected nurseries and all citrus plants within 125 feet of such plants, at this committee's first meeting in September 1984. The committee, which was comprised of the best representatives of the academic and industrial sectors of Florida's agricultural community, made the recommendations to the State agricultural authority based on the best scientific information then available. The rules were clearly based on legitimate grounds, and were reasonably related to the public health crisis that they were designed to remedy. Since the justification for these rules cannot be debated, the question of compensation for a taking should never arise. The respondents had the misfortune of purchasing budwood from a canker infested nursery, but the State could not permit them to maintain these plant materials in light of the possibility that these plants would develop canker, and that the canker would spread to other citrus producing properties through wind, insect movement, irrigation, water runoff, or by people and equipment moving from grove to grove. Respondents, as well as all other economic interests in citrus production in Florida, have benefited from this type of regulation by being protected from unregulated spread of plant pests.

The Petitioner's decision to protect all of the unexposed citrus in Florida from exposed plants is comparable to the legislative choice in *Miller v. Schoene, supra*, to protect apple trees by destroying red cedar trees. It was an apparent impossibility to protect both classes of citrus trees (exposed and non-exposed) in this case, just as in *Miller v. Schoene*, it was impossible to allow red cedar trees to coexist with apple trees. Since the *unexposed* trees had a greater value to the public, the Petitioner had the authority to exercise its judgment to prefer the greater public resource over Respondents' individual property interests, even to the point of destruction.

For the reasons stated above, Petitioner submits that the decision below conflicts with *Mugler v. Kansas*, *Miller v. Schoene*, and *Keystone Bituminous Coal Association v. DeBenedictis* in that it finds the destruction of Respondents' trees to be a taking, fails to recognize the nuisance exception to the takings clause, and fails to directly address the validity of the regulation. The decision below also conflicts with *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3rd Cir. 1987), in which the Court of Appeals, Third Circuit, held that officials of the Pennsylvania Department of Agriculture and USDA had not taken plaintiff's property for public use in adopting a quarantine regulation which prevented movement of poultry outside an area quarantined for avian influenza. The plaintiff could not move its poultry to its processing plant to be slaughtered, and was forced to sell its birds at a substantial loss. The court rejected the takings claim based on the rule of *Miller v. Schoene*, as reaffirmed in *Keystone Bituminous*, and suggested that the government could even have required destruction of the poultry without compensation. 816 F.2d at 915. See also, *Galloway Farms, Inc. v. United States*, 834 F.2d 998 (Fed. Cir. 1987) (1980 wheat embargo held not to be a taking).

The decision below also conflicts with numerous state court decisions, examples of which are: *Louisiana State Board of Agriculture and Immigration v. Tanzmann*, 140 La. 756, 73 So. 854 (1917) (destruction of citrus trees infected with citrus canker is not a taking); *Du Mond v. Walsh*, 189 Misc. 676, 72 N.Y.S.2d 642 (Sup. Ct. 1947) (quarantine of potatoes during golden nematode eradication program is not unconstitutional); *Durand v. Dyson*, 271 Ill. 382, 111 N.E. 143 (1916) (destruction of cattle exposed to hoof and mouth disease is not a taking); *Balch v. Glenn*, 85 Kan. 735, 119 P. 67 (1911) (destruction of orchard to eradicate San Jose scale is not a taking); *State v. Wacker*, 86 Ariz. 247, 344 P.2d 1004 (1959) (regulation requiring plowing under of crop remnants to eradicate pink bollworm is constitutional); *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920) (destruction of red cedar trees to prevent cedar rust from infecting apple trees is not a taking); *State v. Main*, 69 Conn. 123,

37 A. 80 (1897) (destruction of peach trees infected with peach yellows not a taking); *Colvill v. Fox*, 51 Mont. 72, 149 P. 496 (1915) (destruction of apple trees infested with fruit scab not a taking); *Teresi v. State of California*, 180 Cal.App.3d 239, 225 Cal.Rptr. 517 (App. Ct. 1986) (destruction of bell peppers by chemical fumigation in Medfly eradication program is not a taking); *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934) (destruction of growing crop of oats to eradicate European corn borer is not a taking); *Van Gunten v. Worthley*, 159 N.E. 326, 25 Ohio App. 496 (1927) (destruction of wheat crop to control European corn borer is not a taking); *Gray v. Thone*, 196 Iowa 532, 194 N.W. 961 (1923) (no taking in destruction of Japanese barberry bush as a noxious weed); *Los Angeles Berry Growers' Coop. Ass'n. v. Huntly*, 84 Wash. 155, 146 P. 373 (1915) (destruction of potatoes infected with tuber moth not a taking); *Carstens v. De Sellem*, 82 Wash. 643, 144 P. 934 (1914) (no taking in destruction of pear trees to control pear blight). *See also*, *Kent v. Polk County Board of Supervisors*, 391 N.W.2d 220 (Iowa 1986) (regulation prohibiting ownership of vicious animal not a taking).

### CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted to correct the apparent conflict between the decision below and the decisions of this Court, of federal Circuit Courts of Appeal and other State Courts of last resort cited herein.

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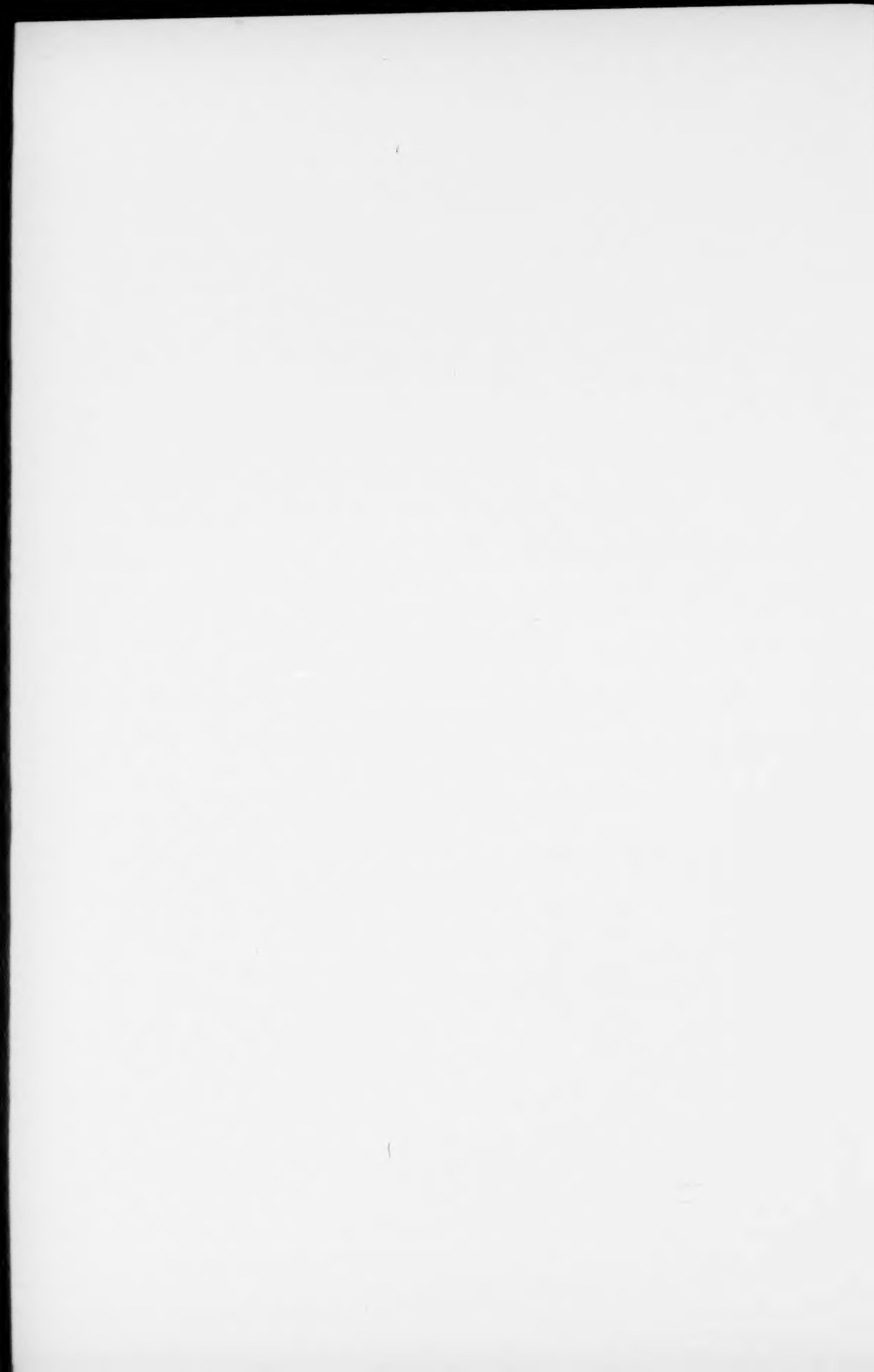
# **APPENDIX**





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# Supreme Court of Florida

Thursday, January 21, 1988

CASE NO. 70,524

District Court of Appeal,  
2d District — No. 86-2785

DEPARTMENT OF AGRICULTURE  
and CONSUMER SERVICES,  
Petitioner,

v.

MID-FLORIDA GROWERS, INC., et al.,  
Respondents.

EHRlich, Justice.

We have for review *State of Florida, Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery*, 505 So.2d 592 (Fla. 2d DCA 1987), in which the district court certified the following question as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS  
POLICE POWER, HAS THE CONSTITUTIONAL  
AUTHORITY TO DESTROY HEALTHY, BUT  
SUSPECT CITRUS PLANTS WITHOUT  
COMPENSATION?

*Id.* at 596. We have jurisdiction. Art. V, §3(b)(4), Fla. Const. We answer the certified question in the negative and approve the decision of the district court below.

During 1984, respondents, Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery, operated citrus nurseries in Hardee County, Florida. In April 1984, they purchased citrus budwood from Ward's Nursery in Polk County. Himrod purchased 8,000 budeyes; Mid-Florida received between 8,500 to 9,000. On August 27, 1984, a form of citrus canker was detected at Ward's Nursery. On September 6, 1984, the Florida Department of Agriculture and Consumer Services (Department) obtained samples from respondents' nurseries to determine whether their stock was infected, and informed respondents on September 10, 1984 that the tests did not establish that any of their stock was infected by or infested with citrus canker. Despite the negative

test results, the Department advised respondents on October 2, 1984, that their nursery stock must be burned and that quarantine was not an acceptable alternative. From October 7 to October 19, 1984, the Department burned 137,880 of Mid-Florida's and 143,594 of Himrod's trees and budwood. The emergency confirmatory orders designating respondents' nurseries as eradication areas and directing destruction of stock within 125 feet of budwood from Ward's Nursery were not issued until October 16, 1984.

Respondents filed an inverse condemnation suit seeking full and just compensation, contending that the Department's destruction of nursery stock which was not infected or diseased resulted in a taking for public purpose. The Department argued that the destruction occurred pursuant to regulatory and police power and did not constitute a taking. A trial was held on the liability issue alone. Although the trial judge noted that the Department's actions were within its police power, he found:

No competent evidence supports the states (sic) concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads us to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation.

(Emphasis in original).

The district court, on appeal, noted that a valid exercise of the police power does not preclude an inverse condemnation suit and that whether a valid exercise of the police power results in a taking must be decided on the facts of each case. 505 So.2d at 594. The district court also determined that the trial court's order in the instant case was clearly supported by substantial, competent evidence. Accordingly, the district court affirmed the trial court's determination that the nursery owners must be compensated and

held that “while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed.” *Id.* at 595.

The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court’s conclusion that destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida’s economy, thereby conferring a public benefit rather than preventing a public harm. *Id.* at 595. Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking. *See Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381 (Fla.), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). Furthermore, we reject the Department’s contention that the state’s lack of a possessory or proprietary interest in the destroyed property precludes a finding that a taking occurred. A taking of private property for a public purpose which requires compensation may consist of an entirely negative act, such as destruction. *See, e.g., Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957) (destruction of healthy citrus trees required compensation). As noted by the United States Supreme Court:

In its primary meaning, the term ‘taken’ would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

*United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed. 311 (1945) (footnote omitted).

The Department next urges that the certified question must be answered in the affirmative because the state, in destroying the trees, validly exercised its police power in conformance with applicable statutes and rules. Although we do not disagree with the Department’s contention that the state’s order was a valid

exercise of its police power, it is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking! See *Albrecht v. State*, 444 So.2d 8 (Fla. 1984). See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3170, 73 L.Ed.2d 868 (1982). As recently stated by the United States Supreme Court, a basic understanding of “the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987).

This principle is illustrated in *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), a case involving circumstances similar to the present case.<sup>2</sup> In *State Plant Board*, a statute provided for destruction of uninfested trees in order to prevent the spread of a citrus disease known as spreading decline. This Court noted that when the state, in the exercise of its police power, destroys decayed fruit, unwholesome meats or diseased cattle, the constitutional requirement of “just compensation” clearly does not compel the state to reimburse the owner for the property destroyed because such property is valueless, incapable of any lawful use, and a source of public danger. The Court went on to conclude that “just

1. We, therefore, also reject the Department’s argument that the trial court, in determining the trees were healthy, ignored agency rules which defined the trees as being suspect and subject to destruction and thereby improperly allowed a challenge to the propriety of agency action in an inverse condemnation proceeding. Although the Department correctly contends that the propriety of an agency’s action may not be challenged in an inverse condemnation proceeding, section 253.763(2), Florida Statutes (1983), the fact that the action was authorized pursuant to agency rules does not, as noted above, preclude a determination that the action constituted a taking. A review of the record discloses that respondents were not permitted to challenge the propriety of the agency action. The pretrial stipulation provides that the disputed fact to be litigated is “whether under the circumstances present, the burning was a taking of property for which full and just compensation is due,” and a trial was held on the liability issue alone.
2. Petitioner’s argument that *State Plant Board v. Smith* is distinguishable from the present case because the legislature provided that just compensation was a requisite to the action of destruction in the act providing for destruction to eradicate spreading decline is not persuasive. Because Article X §6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss. See *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So.2d 289,294 (Fla. 1958). See also *First English Evangelical Lutheran Church*, 107 S.Ct. 2378, 2386 (In the event of a taking, the compensation remedy is required by the Constitution. Neither statutory recognition nor a promise to pay is necessary.)



compensation” was a clear requisite, however, to the act of destroying healthy trees. *Id.* at 406-07. *See also Corneal*, 95 So.2d 1 (A healthy plant may not be destroyed in order to protect a neighbor’s plant of the same species without compensation to the owner.) Accordingly, consistent with our decisions in *State Plant Board* and *Corneal*, we answer the certified question in the negative.

Finally, we reject the Department’s claim that even if the certified question is answered in the negative, no compensation is required under the present circumstances because the trees that were destroyed had been in the presence of or exposed to canker infested nursery stock and were therefore not healthy. As the district court below correctly observed, “[w]hether regulatory action of a public body amounts to a taking must be determined from the facts of each case,” 505 So.2d at 593, and the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation. *See United States v. Certain Parcels of Land in Monroe County*, 509 F.2d 801, 803 (5th Cir. 1975); *Pinellas County v. Brown*, 420 So.2d 308 (Fla. 2d DCA 1982), *petition for review denied*, 430 So.2d 450 (Fla. 1983). The trial court’s determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence. *See Atlantic International Investment Corp. v. State*, 478 So.2d 805, 808 (Fla. 1985); *Faison v. Division of Administration, Department of Transportation*, 299 So.2d 629, 630 (Fla. 1st DCA), *cert. denied*, 305 So.2d 201 (Fla. 1974); *Hardwick v. Metropolitan Dade County*, 256 So.2d 387, 390 (Fla. 3d DCA 1972).

A review of the record in the present case reveals substantial competent evidence was presented at trial on which the trial court based its finding that the trees were healthy. The nursery owners testified at trial that the trees from which the budeyes were removed did not have any visible signs of disease and that the Department had certified on the invoices from Ward’s nursery that the nursery stock had been visually inspected for plant pests and met at least the minimum requirements of Chapter 581, Florida Statutes. Mr. Himrod testified that the leaves were removed from the twigs at the site where the wood was cut, the wood was trimmed and bundled, packed in ice, and transported to his nursery. Later, the wood was unpacked and placed on benches in the sunlight to dry. When dry, the individual eyes were cut off and grafted onto the

liners in the trees in the greenhouse. The sticks were then removed from the nursery and destroyed. He also testified that the tools used in the process were dipped in chlorine to prevent transmitting any virus diseases that may have been present. Mr. Lambert, from Mid-Florida, testified that his nursery followed a process very similar to that described by Mr. Himrod. Dr. Hannon testified as an expert witness for the respondents and stated that the process followed by respondents would diminish the number of living bacterial cells on the wood, if any, and reduce the chances of moving any bacteria with the budsticks. The Department's witness, Calvin Schoulties, conceded that the above steps could reduce the possibility of transmitting any disease that may have been present. Mr. Lambert stated that the budded plants had existed for five months before destruction in optimum conditions for development of bacteria, due to the heat, humidity, and density of the plants in the greenhouses, and that no citrus canker was detected. Dr. Hannon also testified that a nursery environment is more conducive to development of the disease.

The budeyes purchased by Himrod came from Block 7 of Ward's Nursery, a block in which no canker was detected but which lies within 125 feet of an infected block in three different directions. The majority of the budeyes purchased by Mid-Florida also came from Block 7, but some of the budeyes came from Block 106, which tested positive for canker. After the plants were budded, but before receiving notice of a quarantine, approximately 50,000 plants had been transferred out from the respondents' nurseries to customers. Under the Department's emergency rules, 137,800 of Mid-Florida's and 143,594 of Himrod's citrus trees were destroyed after being declared suspect. The 50,000 plants transferred out of the same greenhouses and sold to customers were not destroyed and no canker was ever discovered at these premises. These plants came from areas in the greenhouses which would have caused them to be destroyed if they had still been on the premises at the time the plants in respondents' nurseries were destroyed. We therefore agree with the district court below that the trial court's order in the instant case is clearly supported by substantial, competent evidence.

In conclusion, having answered the certified question in the negative we hold that full and just compensation is required when the state, pursuant to its police power, destroys healthy trees. Because a taking occurred in the instant case when the healthy trees were destroyed, the nursery owners must be compensated.

Accordingly, we approve the decision of the district court.

It is so ordered.

SHAW, BARKETT, GRIMES and KOGAN, J.J., concur.

McDONALD, C.J., dissents with an opinion.

OVERTON, J., recused.

McDONALD, Chief Justice, dissenting.

To justify a finding of inverse condemnation the majority makes a finding that the actions of the Department of Agriculture, in ordering the destruction of the plaintiffs' plants, conferred a public benefit. I totally disagree that this occurred. The department acted under the provisions of section 581.031(17), Florida Statutes (1985),\* and its entire course of action was designed to prevent a public harm. The spread of citrus canker is a public harm; the department took steps to prevent the spread and thereby prevent a public harm. In the exercise of its police power, the department can take reasonable steps to avoid the spread of this disease which can, if not properly checked, literally wipe out the citrus industry. The plaintiffs claim that the destruction of its plants was unnecessary to prevent the harm and that as a result there was an unnecessary and unreasonable taking. They cannot show, however, where this action conferred a benefit to the public other than preventing harm; this is inadequate to support a finding of inverse condemnation.

The conduct of the department should be reviewed in the light of the perceived emergency confronting the department when the canker was found. In hindsight, it may be that the department overreacted and confiscated property not needed, but a review of the department's actions should not be made on hindsight.

\* §581.031(17), Fla. Stat. (1985), grants the Department of Agriculture broad authority:

To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles *capable of harboring* plant pests or noxious weeds, if they are infested or located within an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were *reasonably exposed to infestation*, when *necessary to prevent* or control the *dissemination of plant pests* or noxious weeds *or to eradicate same* and to make rules therefor. (Emphasis added.)

The department had the duty to take emergency measures to prevent an immediate harm — the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation.

The district court of appeal recognized the state's order as a valid exercise of police power, but still approved the finding of inverse condemnation. This could be done only upon a finding that the department's orders and regulations enacted to combat the spread of canker, at the time they were made, were unnecessary or arbitrarily and capriciously applied. See *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1380-81 (Fla.), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). The fact that healthy trees were confiscated does not supply that proof.

Inherent in the decision of *Nordmann v. Florida Department of Agriculture & Consumer Services*, 473 So.2d 278 (Fla. 5th DCA 1985), which cited *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985), whereby the regulations of the department authorizing the extinction of supposedly healthy plants in a canker emergency were approved, is the finding that no compensation is required. I would so construe and affirm that view. Hence I dissent.

**SUPREME COURT OF FLORIDA**

FRIDAY, APRIL 1, 1988

CASE NO. 70,524

District Court of Appeal

2d District - No. 86-2785

DEPARTMENT OF AGRICULTURE  
and CONSUMER SERVICES,

Petitioner,

v.

MID-FLORIDA GROWERS, INC.,  
et al.,

Respondents.

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for petitioner, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

EHRlich, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

McDONALD, C.J., dissents

The Motion to Intervene filed by attorneys for Robert A. Butterworth, Attorney General, Motion to Strike Motion for Rehearing and Motion to Strike Attorney General's Motion to Intervene filed by attorneys for respondent, Motion to Enforce Automatic Stay or in the Alternative to Grant a Stay to Trial Court Proceedings filed by attorneys for petitioner, and Motion for Court to Consider Petitioner's Response to Respondent's Reply filed by attorneys for petitioner are hereby denied.

Respondent's Motion for Attorneys' Fees are granted; the amount to be determined by the trial court. See Fla. R. App. P. 9.400(b), 351 So.2d 981.

A True Copy

TEST

SID J. WHITE

Clerk Supreme Court

TC

cc: Hon. William A. Haddad, Clerk

Hon. Oliver L. Green, Jr., Judge

Hon. Coleman W. Best, Clerk

David C. G. Kerr, Esquire

Susan W. Fox, Esquire

Andrew K. McFarlane, Esquire

Harry Lewis Michaels, Esquire

Frank A. Graham, Jr., Esquire

M. Stephen Turner, Esquire

John M. Hogan, Esquire

Parker D. Thomson, Esquire

Sanford L. Bohrer, Esquire

Cloyce L. Mangas, Jr., Esquire

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

APRIL 10, 1987

Case No. 86-2785

STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURE AND CONSUMER  
SERVICES,

Appellant,

v.

MID-FLORIDA GROWERS, INC., and  
HIMROD & HIMROD CITRUS NURSERY,  
a partnership composed of  
Joe Himrod and Joe B. Himrod,  
Appellees.

RYDER, Acting Chief Judge.

We are here concerned with a complicated issue of law which appears to challenge the long-standing precept that the government, through its police power, may destroy or regulate property "to promote the health, morals and safety of the community" without compensating the property owner for the loss of use of the property or for a decrease in property value. The issue on this appeal is whether the state of Florida, pursuant to its police power, has the constitutional authority to destroy healthy, but "suspect" citrus plants without compensating nursery owners. The following facts are undisputed.

During 1984, appellees operated citrus nurseries in Hardee County, Florida. In April 1984, appellees obtained citrus budwood from Ward's Nursery, a citrus nursery in Polk County. On August 27, 1984, a form of citrus canker was discovered at Ward's Nursery. On September 6, 1984, the Department of Agriculture obtained samples from appellees' nurseries. On September 10, 1984, the Department informed appellees that the tests were negative: they did not establish that any stock was infected with citrus canker. Despite this fact, however, on October 2, 1984, appellees were advised that their nurseries had to be burned and that quarantine was not an acceptable alternative. On October 16, 1984, the



Department entered an emergency confirmatory order designating appellees' nurseries as eradication areas and directing destruction of their nursery stock from Ward's Nursery and all other stock within 125 feet thereof. From October 7 to October 19, 1984, the Department burned some 137,880 of Mid-Florida's and 143,594 of Himrod's citrus trees.

Appellees brought this action seeking full and just compensation based upon inverse condemnation for the destruction of citrus trees by the state as a result of its efforts to eradicate citrus canker. A trial was held on the liability issue alone. The trial judge held that a taking had occurred and ordered a jury trial as to damages. The trial judge stated:

This cause came on for trial on September 24, 1986, on the issue of liability only, and having weighed the evidence and considered the Pretrial Stipulation, the Court finds:

1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.
2. No competent evidence supports the states (sic) concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation. (Emphasis in original.)
3. Defendant knew that Plaintiffs were not authorizing full satisfaction of their claims and would accept any payment as partial only, and Defendant forewent any right to rely on its own condition of payment. Therefore,



Plaintiffs did not release their constitutional right to just compensation.

This appeal ensued.

Whether regulatory action of a public body amounts to a taking must be determined from the facts of each case. *Pinellas County v. Brown*, 450 So.2d 240, 242 (Fla. 2d DCA 1984); *Pinellas County v. Brown*, 420 So.2d 308, 309 (Fla. 2d DCA 1982). The trial court's determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by substantial, competent evidence. *Faison v. Division of Administration, Department of Transportation*, 299 So.2d 629 (Fla. 1st DCA 1974). The trial court's order in the instant case is clearly supported by substantial, competent evidence. Accordingly, we affirm.

Initially, we must draw attention to the difference between the power of eminent domain and the police power. Eminent domain is the sovereign power to take property for a public use or purpose. The sovereign must make just compensation for any property taken. Police power is the sovereign power to destroy or regulate the use of property to "promote the health, morals and safety of the community." The sovereign may exercise its police power without making just compensation for the property taken. *Adams v. Housing Authority of City of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

A valid exercise of the police power does not preclude an inverse condemnation suit. "It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984).

It is difficult to determine when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. No settled formula exists. Whether a valid exercise of the police power results in a taking must be decided on the facts of each case. The Florida Supreme Court has compiled the following list of factors which have been used in analyzing takings in the past:

1. Whether there is a physical invasion of the property.

2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.

*Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1380-81 (Fla. 1981). The Florida Supreme Court further stated: "If the regulation is arbitrarily and capriciously applied it is an invalid exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power." *Id.* at 1381. The court then stated, "[i]t may be, however, that a regulation complies with standards required for the police power but still results in a taking," citing as authority *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922). The court construed *Pennsylvania Coal Co.* as follows:

In *Pennsylvania Coal Co.* the Court considered a Pennsylvania statute, passed to protect the public safety, which prohibited subsurface mining of coal if such mining would cause subsidence of the surface. The Court held that enforcement of the statute amounted to a taking which required compensation. In holding that the mining prohibition was unconstitutional as applied, the court emphasized that the statute rendered the coal company's rights to subsurface minerals virtually worthless.

*Graham*, 399 So.2d at 1381.

Similarly, the United States Supreme Court has stated that whether a taking has occurred can only be determined on a case-by-case basis:

While this court has recognized that the "Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104 (1958); see *United States v. Caltex, Inc.*, 344 U.S. 149, 156, 73 S.Ct. 200, 203 (1952).

*Penn Central Transportation Co. v. City of New York*, 438 U.S. 103, 98 S.Ct. 2646 (1978).

Both the First and Fifth District Courts of Appeal have held constitutional the state's exercise of its police power in ordering the destruction of healthy but suspect trees. *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985); *Nordmann v. Florida Department of Agriculture and Consumer Services*, 473 So.2d 278 (Fla. 5th DCA 1985). Neither court reached the compensation issue. In *Denney*, the court stated:

At this time, we do not attempt to determine whether appellants' trees are in fact healthy or diseased. Nor do we address the issue of compensation. We hold only that the immediate final order and the rules under which it was promulgated adequately show that the threat of spreading citrus canker is of sufficient imminence and scope to justify the emergency order entered by the department.

*Denney*, 462 So.2d at 537. The fifth district in *Nordmann* followed the first district's *Denney* decision and rationale.

We join our sister courts in holding that the state's order was a valid exercise of its police power. Unlike our colleagues, however, we must go one step further and determine whether the valid exercise of the police power resulted in a taking. We conclude that it did.

When the state, in the exercise of its police power, destroys diseased cattle, decayed fruit or diseased trees, the constitutional requirement of "just compensation" clearly does not compel the state to reimburse the owner for the property destroyed. Such property is incapable of any lawful use, it is valueless, and it is a source of public danger. "A legislative provision for compensation in such cases is a mere bounty." *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959).

Different is the situation, however, where healthy cattle, fruit or trees are destroyed to protect public health, safety or welfare. While the general principle is that no compensation is required when there is a valid exercise of the police power, the general principle is not without exception. Whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances in that case." *Penn; Smith*.

Citrus canker is a virulent disease which first appeared in Florida in 1914. At that time, drastic measures were taken to eradicate the state of the disease. The measures included destruction of many citrus trees. Florida was declared free of the disease in 1927.

Citrus canker reappeared in Florida in August of 1984. The Florida Department of Agriculture took immediate steps to eradicate the disease before the infected area spread and resulted in economic disaster for Florida's citrus industry. The Department of Agriculture, acting pursuant to the broad powers given it in Article IV, Section 4 of the Florida Constitution and sections 570.07(21) and 581.031(7), Florida Statutes (1983), began ordering destruction of citrus trees found to be diseased or to be suspect.

Appellees had the misfortune of having innocently bought a few hundred budsticks from Ward's Nursery, which was subsequently declared to be infested with canker. The state examined and tested appellees' trees. The tests proved negative. Yet, the state ordered the destruction of appellees' healthy trees.

We hold that while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed. The nursery owners must be compensated. We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery. As the United States Supreme Court stated in *Penn Central*, citing to *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960), "the Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 2659.

While we feel our disposition is correct, because this case involves such an important area of the law and because this malady is likely to revisit us, we certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER THE STATE, PURSUANT TO ITS  
POLICE POWER, HAS THE CONSTITUTIONAL  
AUTHORITY TO DESTROY HEALTHY, BUT  
SUSPECT CITRUS PLANTS WITHOUT  
COMPENSATION?

Affirmed.

CAMPBELL and LEHAN, JJ., Concur.

IN THE CIRCUIT COURT OF THE  
TENTH JUDICIAL CIRCUIT  
IN AND FOR HARDEE COUNTY, FLORIDA  
(October 10, 1986)  
CASE NO. CA-G-85-275

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composed of Joe Himrod  
and Joe B. Himrod,  
Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURE AND CONSUMER  
SERVICES,  
Defendant.

ORDER OF LIABILITY FOR TAKING

This cause came on for trial on September 24, 1986, on the issue of liability only, and having weighed the evidence and considered the Pretrial Stipulation, the Court finds:

1. A police power circumstance existed to protect the economic public welfare, and Defendant's actions with respect to Plaintiffs' nursery stock were within its police power.

2. No competent evidence supports the states concern that the Plaintiffs' nursery stock was infected or diseased so as to justify destruction. The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the *legal* conclusion that no citrus canker was present. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking has occurred in this instance and Plaintiffs are entitled to full and just compensation.

3. Defendant knew that Plaintiffs were not authorizing full satisfaction of their claims and would accept any payment as partial only, and Defendant forewent any right to rely on its own

condition of payment. Therefore, Plaintiffs did not release their constitutional rights to just compensation.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs are entitled to a judgment of liability against the Defendant for inverse condemnation, and this cause shall proceed to jury trial on the issue of damages upon notice duly given.

DONE AND ORDERED this 10 day of October, 1986.

OLIVER L. GREEN, JR.  
Circuit Judge

Copies furnished:

M. Stephen Turner, Esq.  
Robert Chastain, Esq.  
Frank A. Graham, Esq.  
Harry Lewis Michaels, Esq.



## **UNITED STATES CONSTITUTION**

### **AMENDMENT V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **AMENDMENT XIV**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any

State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## **CONSTITUTION OF THE STATE OF FLORIDA**

### **ARTICLE IV**

#### **SECTION 4. Cabinet. —**

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating

commission for the supreme court, or as otherwise provided by general law.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller. Such order may be in any form and may require the disbursement of state funds by electronic means or by means of a magnetic tape or any other transfer medium.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

## **CONSTITUTION OF THE STATE OF FLORIDA**

### **ARTICLE X**

#### **SECTION 6. Eminent domain. —**

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

**FLORIDA STATUTES (1983)**

**570.07 Department of Agriculture and Consumer Services; functions, powers, and duties.**—The department shall have and exercise the following functions, powers, and duties:

(1) Inquire into the needs of agriculture of the state, and make appropriate recommendations to the Governor and the Legislature, except as to such functions as are specifically assigned under state law to other state agencies.

(2) Perform all regulatory and inspection services relating to agriculture except agricultural education, demonstration, research, and those regulatory functions relating primarily to the protection of the public health or assigned by law to other state agencies.

(3) Make investigations, conduct hearings, and make recommendations concerning all matters relating to the powers, duties, and functions of the department as provided by law.

(4) Cooperate with the United States Department of Agriculture in obtaining and disseminating production statistics, market and trade information concerning demand, supply, prevailing prices, and commercial movements of agricultural products and extent of products in storage, and cooperate with any other state or federal agencies which in any manner may be helpful to agriculture. It may compile, publish and disseminate information and pertinent data on crops, livestock, poultry, and agricultural products and may provide matching funds with other agencies, local, state, or national for the conduct of such service.

(5) Annually fix such inspection and license fees and recording and service charges within maximum limits provided by law as may be necessary to pay the cost of the service performed, maintenance of reasonable reserves for contingencies, including cost of depository, accounting, disbursement, auditing, rental of quarters and facilities furnished by the state, and payment of compensation to fruit and vegetable inspectors for overtime work, for which industry has been billed, in excess of 40 hours per week at the same rate of pay as received for normal work hours, in those cases where conditions do not permit reimbursement for overtime work by giving compensatory time.

(6) Foster and encourage the standardizing, grading, inspection, labeling, handling, storage, and marketing of agricultural products. And, after investigation and public hearings thereon, acting in cooperation with the United States Department of Agriculture, to establish and promulgate standard grades and other standard classifications of and for agricultural products.

(7) Extend in every practicable way the distribution and sale of Florida agricultural products throughout the markets of the world.

(8) Promote, in the interest of the producer, the distributor, and the consumer, the economical and efficient distribution of agricultural products of this state; and to that end cooperate with the Department of Commerce of the United States and any other department or agency of the federal or state government.

(9) Obtain and furnish information relating to the selection of shipping routes, adoption of shipping methods, avoidance of delays in the transportation of agricultural products, or helpful in the solution of other transportation problems connected with the distribution of agricultural products.

(10) Act as adviser to producers and distributors, when requested and to assist them in the economical and efficient distribution of their agricultural products as well as to assist and encourage cooperative effort among producers to gain economical and efficient production of agricultural products.

(11) Foster and encourage cooperation between producers and distributors in the interest of the general public.

(12) Act as a mediator or arbitrator in any controversy or issue that may arise between producers and distributors of any agricultural products concerning the grade or classification of such products.

(13) Protect the agricultural and horticultural interests of the state, and to that end it shall enforce those functions, powers, and duties given to it in chapter 581, and all other laws relating thereto.

(14) Inspect apiaries for diseases inimical to bees and beekeeping and enforce the laws relating thereto.

(15) Protect the livestock interests of the state, and to that end it shall enforce those functions, powers, and duties given to it in chapter 585, and all other laws relating thereto.

(16) Enforce the state laws and regulations relating to: fruit and vegetable inspection and grading; spray, residue inspection, and removal; registration, labeling, inspection and analysis of commercial stock feeds and commercial fertilizers; classification, inspection, and sale of poultry and eggs; registration, inspection and analysis of gasolines and oils; registration, labeling, inspection, and analysis of pesticides; registration, labeling, inspection, germination testing and sale of seeds, both common and certified; weights, measures, and standards; foods, as set forth in the Food, Drug and Cosmetic Law; inspection and certification of honey; sale of liquid fuels; the licensing of dealers in agricultural products; administration and enforcement of all regulatory legislation applying to milk and milk products, ice cream and frozen desserts; recordation and inspection of marks and brands of livestock; and all other regulatory laws relating to agriculture.

(17) Receive and compile reports on all fruits, vegetables, and other farm products as are grown in the state, to publish same in the state press that will do so without cost; to obtain and disseminate information as to carriers' rates, to collect information as to additional market centers and their capacity, and to keep and compile a statement of all shipments moving out of the state, that through this information the farmers and producers can be kept posted as to exact conditions existing in the state, and the several markets of the country, to better cooperate with and prevent a loss to our people, and to cooperate with the United States Government in establishing and maintaining a market news system; to issue such bulletins or other information along lines of advice as to how best pick, pack, kind of package, and way to distribute; to study all conditions as affecting other states; to keep in touch with the Department of Agriculture at Washington, D. C., that through this close touch and study of conditions, it can advise our people what crops to plant or not plant, what markets are overstocked, and through a system of cooperation aid in development of agricultural interests and protection of Florida's producers; to devise such methods as will best carry forward this work, such as inspection of packages and other measures as conform to plans of the marketing system of the Department of Agriculture at Washington; to publish or issue bulletins listing for sale, exchange, and wanted items for farmers; to do all that



can be done to bring relief to and aid in the marketing and distribution of Florida's products.

(18) Instruct in the standardization, grading, packing, processing, loading, refrigeration, routing, diversion, and distribution of farm products; to carry on research work or cooperate with other state or federal agricultural agencies on research work in marketing and to provide any other information and assistance necessary to the efficient selling of farm products; to acquire suitable sites and erect thereon necessary marketing facilities, livestock pens and properly equip, maintain, and operate same for the handling of all staple field crops, meats, fruits and vegetables, poultry and dairy products, and all farm and home products, and for selling and loading livestock, and to let or lease space therein and thereon; to store, or refrigerate any meats, vegetables, fruits, poultry or dairy products; to employ such managers and other help as may be necessary to operate the plants and pens and market the products handled, and make such charges for such services as will cover the costs of operation and maintenance.

(19) Protect the dairy interests of the state, and to that end it shall enforce these functions, powers, and duties given to it in chapters 502 and 503.

(20) Stimulate, encourage, and foster the production and consumption of agricultural products; conduct activities that may foster a better understanding and more efficient cooperation among producers, dealers, buyers, food editors, and the consuming public in the promotion and marketing of Florida agricultural products; sponsor trade breakfasts, luncheons, and dinners and distribute promotional materials and favors in connection with meetings, conferences, and conventions of dealers, buyers, food editors, and merchandising executives that will assist in the promotion and marketing of Florida agricultural products to the consuming public.

(21) To declare an emergency when such exists, as defined in chapters 581 and 585, and make, adopt, and promulgate rules and regulations which would be effective during the term of such emergency.

(22) Hold hearings, administer oaths, subpoena witnesses and take testimony in all matters relating to the exercise and



performance of the powers and duties of the department. Upon failure or refusal of any witness to obey any subpoena, the department may petition the circuit court having jurisdiction in the county within which the seat of government is located, and upon proper showing, the court shall enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the order of the court shall be punishable as a contempt of court.

(23) Enact, amend, and repeal necessary administrative rules.

(24) In its discretion, adopt and promulgate rules pertaining to the inspection of quality, the truthful and honest branding of each package shipped, and the prohibiting of any shipper having the benefit of shipping through the facilities of the department who does not strictly observe and obey such rules in the preparation, packing, and shipping of his agricultural products.

(25) With the approval of a majority of the Board of Trustees of the Internal Improvement Trust Fund, the department may sell, exchange, convey, or otherwise dispose of any real property owned or held by it when, in its judgment, such property is not needed for the purpose for which the said property was held and cannot be put to any other beneficial use by the department. A deed to any real property owned or held by the department, duly executed by the department and witnessed by a majority of the board of trustees, shall be sufficient to convey all the right, title and interest of the said department or of the state in and to the property described therein.

(26) Sell, exchange, convey or otherwise dispose of any personal property and lease any real property owned or held by the department when in its judgment, such property is not needed for the purpose for which the said property was held and cannot be put to any other beneficial use by the department.

(27) Incur expenses for membership dues in the national and southern associations of state departments of agriculture and other organizations affiliated with agriculture and for presentment of plaques and framed certificates for outstanding service.

(28) For pollution control purposes, regulate open burning connected with rural land-clearing, agricultural, or forestry operations, except as to fires for cold or frost protection.

(29) Advance funds monthly to career service employees whose duties require the purchase of official state samples for state examination, to be used for the purchase of such samples. Each monthly advance shall be in an amount equal to one-twelfth of the actual expenses paid the position for such samples in the previous fiscal year, or in the case of new positions, one twelfth of the expenses paid for samples of a similar classification in the previous fiscal year; however, in the event of unusual circumstances, such advances may be increased for a period not to exceed 60 days. Such advances shall be granted to each such career service employee as long as the employee remains in a position which requires the purchase of samples and is employed by the department and shall be granted only to career service employees who have executed a proper power of attorney with the department to insure the proper collection of such advances in case it may become necessary.

#### **FLORIDA STATUTES (1983)**

**581.031 Department; powers and duties.**—The department shall have the following powers and duties:

(1) To make all rules governing nurseries and the movement of nursery stock therein as may be necessary in the eradication, control, or prevention of the dissemination of plant pests or noxious weeds.

(2) To make and publish standard grades for nursery stock.

(3) To make rules governing the grading, marking, sale, and distribution of nursery stock by nurserymen, stock dealers, agents, and plant brokers.

(4) To provide rules under which nursery stock may be brought into this state from other states, territories, and foreign countries.

(5) To make such rules with reference to plants and plant products while in transit through this state as may be deemed necessary to prevent the introduction into and dissemination within this state of plant pests and noxious weeds.

(6) To declare a plant pest or noxious weed to be a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same.

(7) To declare a quarantine against any area, place, nursery, grove, orchard, county, or counties within this state, other states, territories, foreign countries or portion thereof in reference to plant pests or noxious weeds and prohibit the movement within this state from other states, territories, or foreign countries of all plants, plant products, or other things from such quarantined places or areas which are likely to carry such plant pests or noxious weeds if such quarantine is determined, after due investigation, to be necessary in order to protect the agricultural and horticultural interests of this state. In such cases, the quarantine may be made absolute or rules may be adopted prescribing the method and manner under which the prohibited articles may be moved into or within, sold, or otherwise disposed of in this state.

(8) To make and publish reasonable rules governing the application for, and issuance, suspension, and revocation of, certificates of registration and of inspection.

(9) To enter into cooperative arrangements with any person, municipality, county, and other department of this state and boards, officers, and authorities of other states and the United States for inspection with reference to plant pests and noxious weeds for the control and eradication thereof and contribute a just proportionate share of the expenses incurred under such arrangements.

(10) To publish at regular intervals, to be determined by it, an official organ of the department for public distribution. It may from time to time publish and distribute to the public such further information as may be deemed necessary.

(11) To suspend or revoke certificates of inspection and of registration of nurserymen, stock dealers, agents, and plant brokers in the state.

(12) To purchase all necessary materials, supplies, office and field equipment, and other things and make such other expenditures as may be essential and necessary in carrying out the provisions of this chapter within the limits of the amount appropriated by law.

(13) To enforce the provisions of this chapter by writ of injunction in the proper court as well as by criminal proceedings.

(14) To test nursery stock to determine freedom from specific diseases and to register such stock. Nursery stock found free of the diseases for which it was tested may be propagated by the department, if authorized by the owner, and reproductive parts distributed in limited quantities to qualified persons for further propagation under procedures prescribed by the department when recommended by the industry concerned. The department may prescribe standards and procedures for the propagation and distribution of new or superior strains of plants when not provided for by other agencies and upon recommendation of the industry concerned. The department may prescribe a fee for such services, provided the fee shall not exceed the cost of the services rendered, and may sell at a reasonable price any plant or plant part that may result from the propagation of tested plants as sources of propagating material for distribution to the industry. Also, the department may sell in the best interest of the state any fruit produced incidental to such propagation.

(15) To inspect, or cause to be inspected by duly authorized representatives, plants, plant products, or other things and substances that may, in its opinion, be capable of disseminating or carrying plant pests or noxious weeds, and for this purpose shall have power to enter into or upon any place and to open any bundle, package, or other container containing, or thought to contain, plants or plant products or other things capable of disseminating or carrying plant pests or noxious weeds.

(16) To carry on investigations of methods of control, eradication, and prevention of dissemination of plant pests or noxious weeds.

(17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests or noxious weeds, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor.

(18) To inspect, or cause to be inspected, all nurseries in the state at such intervals as it may deem best and to keep a complete, accurate, and current list of all certified nurseries to include:

- (a) Name of nursery.
- (b) Name of the nursery's owner.
- (c) Mailing address of nursery.
- (d) Location of nursery.
- (e) Type of crop grown.
- (f) Size of acreage of nursery.
- (g) Type of stock dealer or plant broker.

(19) To demand of any person who has in his possession or under his control plants or plant products or other things likely to carry plant pests or noxious weeds full information as to the origin and source of same; and it shall be a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, for such person to refuse to give the information demanded, if able to do so.

(20) To intercept and inspect or cause to be inspected, while in transit or after arrival at destination, all plants, plant products, or other things likely to carry plant pests or noxious weeds being moved into this state from another state, territory, or foreign country; and, if, upon inspection, the same be found to be infested or infected with a plant pest or noxious weed or if such material is believed to be likely to communicate or transmit same or is being or has been transported in violation of any of the rules of the department, then said plants, plant products, or other things may be treated when necessary and released, returned to the sender, or destroyed.

(21) To make and issue certificates of registration and of inspection to nurserymen, stock dealers, agents, and plant brokers, after proper certification of their nursery stock, authorizing them to do business as nurserymen, stock dealers, agents, or plant brokers within the state.

(22) To collect or accept from other agencies or individuals specimens of arthropods, nematodes, fungi, bacteria, parasitic plants, or other organisms for positive identification, and to provide suitable space for their storage and maintenance. The department arthropod collection will be known as the "Florida State Collection of Arthropods."

(23) To provide, when requested by farmers, growers, or other interested parties, special inspections, special certifications, special investigations, or other plant regulatory activities not otherwise

specifically provided for in these statutes; and as authorized, to prescribe the fee for such services, provided that the fee shall not exceed the cost of the service rendered, including the salaries and expenses of the personnel involved.

(24) To prescribe the duties of assistants, authorized representatives, inspectors, and other employees as may be required and delegate to such assistants, authorized representatives, inspectors, and other employees such powers and authority as may be deemed proper within the limits of the powers and authority conferred upon the said director by this chapter.

(25) To enter into cooperative arrangements with any person, firm, agency, company, or other entity for the production and distribution of organisms, pesticides, chemical compounds, or other methods of control investigated, discovered, or developed by, or with the assistance of, the department through the Division of Plant Industry and to accept a royalty or other remuneration for its services or contributions, any proceeds from which shall be deposited in the Nursery Inspection Fee Fund.



5BER84-8 Citrus Canker Rule and Quarantine

(l) Definitions. For the purpose of this rule chapter, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Department. State of Florida Department of Agriculture and Consumer Services.

(b) Division. Division of Plant Industry, State of Florida Department of Agriculture and Consumer Services.

(c) Certificate. An official document stipulating compliance with the requirements of the department or the United States Department of Agriculture.

(d) Citrus. All members of the subfamily Aurantioideae, of the family Rutaceae according to Swingle and Reese, including any parts thereof.

(e) Citrus canker disease. A bacterial disease incited by *Xanthomonas campestris* pv. *citri* causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae family.

(f) Common carrier. An individual or corporation licensed to transport persons, goods, or messages for compensation.

(g) Host plant. A plant or part thereof known or suspected to be capable of harboring or transporting citrus canker in any of its stages.

(h) Infected or infested. Actually harboring citrus canker, or so exposed to any stages of development of the citrus canker that it is reasonable to believe an infection or infestation could exist.

(i) International movement. Movement into Florida from a country outside the United States or movement from Florida to a country outside the United States.

(j) Interstate movement. Movement from Florida to another state or from another state to Florida.

(k) Intrastate movement. Movement from any part of the State of Florida to another part of Florida.



(l) Regulated area. Any state or portion thereof including Florida and any county, precinct, city and other minor civil division designated by order of the department, the USDA, or the affected state as an area regulated due to the presence of citrus canker.

(m) Regulated articles. Any article, including soil, capable of transporting or harboring citrus canker.

(n) Shipment or shipments. The act or process of transferring or moving products from one point to another, or the products being transferred or moved.

(o) Treatment or eradication area. An area where it has been determined that citrus canker exists or is believed to exist or is located in such proximity to an infection or infestation of the disease that destruction of infected or infested material or treatments must be made to eliminate the disease.

(p) USDA. United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

(2) Purpose of rule chapter. The purpose of this rule chapter is to prevent the spread of citrus canker within the State of Florida, and introduction of that disease into Florida from foreign and domestic sources. This rule is promulgated to provide a quarantine on any regulated area, and to specify conditions under which regulated articles may be certified as free of citrus canker when moved from the regulated area to a nonregulated area. This rule also provides for the treatment and eradication of citrus canker in all designated regulated areas within the State of Florida.

(3) Quarantined area.

(a) All countries, territories, states, counties, cities, farms, nurseries, urban properties, packinghouses, florists, or portions thereof, found to be infected or infested with citrus canker, or so located that it is reasonable to assume that infection or infestation is likely to have occurred, shall be considered regulated areas.

(b) That portion of Polk County lying within the following described areas: NE  $\frac{1}{4}$  of SE  $\frac{1}{4}$ ; S  $\frac{1}{2}$  of SE  $\frac{1}{4}$  of NE  $\frac{1}{4}$ ; S  $\frac{1}{4}$  of N  $\frac{1}{2}$  of SE  $\frac{1}{4}$  of NE  $\frac{1}{4}$ ; SE  $\frac{1}{4}$  of SE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of SW

$\frac{1}{4}$  of NE  $\frac{1}{4}$ ; E  $\frac{1}{4}$  of SE  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NE  $\frac{1}{4}$ ; NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of SE  $\frac{1}{4}$ ; N  $\frac{1}{4}$  of N  $\frac{1}{2}$  of SE  $\frac{1}{4}$  of SE  $\frac{1}{4}$  Section 25, Township 32S, Range 28E. SW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$ ; W  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$ ; W  $\frac{1}{4}$  of W  $\frac{1}{2}$  of NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$ ; NW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of SE  $\frac{1}{4}$ ; N  $\frac{1}{4}$  of N  $\frac{1}{2}$  of SE  $\frac{1}{4}$  of SE  $\frac{1}{4}$  Section 25, Township 32S, Range 28E. SW  $\frac{1}{4}$  of Sw  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$ ; W  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$ ; W  $\frac{1}{4}$  of W  $\frac{1}{2}$  of NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$ ; NW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of Section 30, Township 32S, Range 29 E are quarantined. This area may be extended to include any additional infected or infested areas or any areas considered to be or have been subjected to infection or infestation by oral order to be followed by written notice to property owner. Notice may be given by publication in a local newspaper of general circulation when affected privately-owned properties are too numerous to practically contact each owner.

(4) Regulated articles.

(a) Plants and plant parts including fruit and seeds of any of the following species:

1. *Poncirus trifoliata* (trifoliata orange)
2. *Fortunella margarita* (kumquat)
3. *Citrus* spp. (all) (lemon, lime, pummelo, grapefruit, orange, mandarin, tangerine, satsuma, etc.)

(b) Pulp and peel resulting from the processing of citrus fruit.

(c) Trucks, tractors and any other equipment used in the production, cultivation, harvesting, and transportation of host plants.

(d) Hand and garden tools and nursery equipment used on the property where host plants are grown.

(e) Any other products, articles, or means of conveyance, of any character whatsoever, when it is determined by an inspector that they present a hazard of spread of citrus canker, and the person in possession thereof has been so notified.

(5) Procedure for establishing a regulated area. Based upon investigation and findings by the department that an immediate danger to the public health, safety or welfare exists, the department, through an authorized representative, may by oral order, designate as a regulated area any county, precinct, city, political subdivision or any minor civil division thereof, in which citrus canker has been determined to exist or in which it is deemed necessary to regulate because of proximity to an infected or infested area of citrus canker, or its inseparability for quarantine enforcement purposes from an infected or infested area. Such oral order shall become a final order when issued in writing by the department to the governing body or its representative of each affected county, precinct, city, political subdivision, or any minor civil division thereof, or the owner or his representative of privately-owned property. A regulated area may be designated by legal notice published in a local newspaper of general circulation when affected privately-owned properties are too numerous to practically contact each owner or when such areas are only a portion of a political subdivision.

(6) Certification of regulated articles. Certification of regulated articles may be based on treatment by an approved method of the USDA-APHIS. The certificate of treatment shall include the method of treatment, and other pertinent data regarding treatment as listed in the USDA-APHIS Manual. All treatments must be in accordance with the Environmental Protection Agency and Occupational Safety and Health Agency guidelines.

(7) Movement of regulated articles.

(a) International movement of regulated articles: All regulated articles moving from Florida to other countries or territories outside the United States must comply with USDA Quarantine requirements.

(b) Interstate movement of regulated articles: All regulated articles moving from Florida to other states of the United States must comply with USDA Quarantine requirements.

(c) Intrastate movement of regulated articles:

1. All regulated articles are prohibited from movement within the State of Florida unless accompanied by a limited permit or a valid certificate issued by the USDA or the department.

2. Regulated articles may move from a regulated area through or to a nonregulated area where such articles are moved in a manner prescribed by the USDA or the department that precludes the possible spread of citrus canker, and accompanied by a limited permit or a valid certificate.

(8) Entry of authorized representative upon properties. All owners and occupants of properties on which citrus canker is known to exist or is suspected to exist are hereby ordered and required to permit entry of department representatives upon said properties for purposes of inspecting, taking of specimens, and applying or supervising treatments to the soil, plants, or any other articles designated by the department when deemed necessary. This may include destruction of plants and other infected or infested articles.

(9) Designation of eradication or treatment areas, announcement of treatment schedules and treatment eradication procedures.

(a) An area may be designated as a treatment or eradication area for the purpose of eradication of citrus canker, upon determination that citrus canker exists in the area, or is believed to exist in the area, or is located in proximity to an infection or infestation of citrus canker. Those areas shall be declared as treatment or eradication areas.

(b) Treatment or eradication areas shall be treated as recommended by the USDA and the department upon official declaration by the USDA or department as treatment or eradication areas. Treatments and methods to be used shall meet the requirements of federal and state regulatory agencies and may include removal and destruction of host fruit, trees, propagative materials (both sexual and asexual), and plant debris.

(c) Treatment may be applied by aircraft, ground vehicles, including tractors or equipment attached to such vehicles, hand carried equipment, aquatic and amphibious vehicles, or any other method of application prescribed by the USDA or the department.

(d) Announcement of treatment or eradication area designation and treatment schedule. Representatives of the USDA and department may, by oral order, designate an area as a treatment or eradication area. Such oral order shall become final when issued

in writing by the USDA or the department to the governing body of the county, precinct, city, political subdivision, or any minor civil division thereof, or the owner or representative of privately-owned property. A treatment area and treatment schedules may be declared by legal notice published in a local newspaper of general circulation, when affected privately-owned properties are too numerous to practically contact each owner or when such treatment or eradication areas are only a portion of a political subdivision.

(10) Provisions for eradication. Citrus canker is a highly contagious, infectious, highly destructive pathogen and a public nuisance. The department is empowered to destroy or order owners or persons having charge of premises where the disease is found, to destroy plants or objects which are infected or infested, or exposed to infection or infestation, or to carry out any measure deemed necessary to control the pathogen. Eradication procedures shall include:

(a) The destruction or treatment of infected or infested plants or parts of plants, or any plants or parts of plants exposed to infection or infestation, as prescribed by the division.

(b) The destruction or treatment of any infected or infested regulated article, or any article exposed to infection or infestation, as prescribed by the division.

(c) Orders issued for the destruction or treatment of infected plants, parts of plants, or plants or parts of plants exposed to infection or infestation, and for the destruction or treatment of regulated articles, issued by the department through any of its authorized representatives to owners or persons having charge of premises where citrus canker is found shall be binding, and compliance shall be forthwith, as prescribed by the department.

(d) Compensation shall not be awarded for the destruction of infected plants, plants exposed to infection or infestation, parts of plants, or for any damages to regulated articles resulting from any treatment prescribed by the department or USDA, except for any special provision for compensation that may be established by the Legislature or the Executive Branch of State Government for damages incurred as a result of carrying out any control or eradication procedure for citrus canker.

(11) Penalties for violation. Any person who shall violate any provision or requirement of this chapter shall be subject to the penalties of Sections 581.141 and 581.211, Florida Statutes. Specific Authority 120.54(9); 570.07(21), (23); 581.031(1), (4), (5) FS.

Law Implemented 570.07(2), (13), (21); 581.031(6), (7), (9), (15), (17); 581.083; 581.101; 581.141; 581.211 FS.

History - New

NAME OF PERSON ORIGINATING THE EMERGENCY RULE: Dr. Salvatore A. Alfieri, Director, Division of Plant Industry.

NAME OF PERSON WHO APPROVED THE EMERGENCY RULE: Doyle Conner, Commissioner of Agriculture, State of Florida.

#### 5BER84-9 Citrus Canker Eradication

(1) Definitions. For the purpose of this rule chapter, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Budwood. A portion of a stem or branch with a vegetative bud or buds used in propagation by budding or grafting.

(b) Certificate. An official document stipulating compliance with the requirements of the department or the United States Department of Agriculture.

(c) Citrus. All members of the subfamily Aurantioideae, of the family Rutaceae according to Swingle and Reese, including any parts thereof.

(d) Citrus canker disease. A bacterial disease incited by *Xanthomonas campestris* pv. *citri* causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae family.

(e) Common carrier. An individual or corporation licensed to transport persons, goods, or messages for compensation.

(f) Department. State of Florida Department of Agriculture and Consumer Services.



(g) Division. Division of Plant Industry, State of Florida Department of Agriculture and Consumer Services.

(h) Host plant. A plant or part thereof known or suspected to be capable of harboring or transporting citrus canker in any of its stages.

(i) Infected or infested. Actually harboring citrus canker, or so exposed to any stages of development of the citrus canker that it is reasonable to believe an infection or infestation could exist.

(j) International movement. Movement into Florida from a country outside the United States or movement from Florida to a country outside the United States.

(k) Interstate movement. Movement from Florida to another state or from another state to Florida.

(l) Intrastate movement. Movement from any part of the State of Florida to another part of Florida.

(m) Regulated areas: Any state or portion thereof including Florida and any county, precinct, city and other minor civil division designated by order of the department, the USDA, or the affected state as an area regulated due to the presence of citrus canker.

(n) Regulated articles: Any article, including soil, capable of transporting or harboring citrus canker.

(o) Rootstock. A plant used as the recipient understock in budding or grafting. This includes plants resulting from asexual reproduction (seedlings), and plants resulting from asexual reproduction, rooted cuttings, air layers (Murcotts), plants produced by tip grafting or meristematic culture, and plants resulting from nucellar embryos (nucellar seedlings).

(p) Shipment or shipments. The act or process of transferring or moving products from one point to another, or the products being transferred or moved.

(q) Scion. A portion of a citrus plant which includes at least one bud to be inserted into a rootstock to produce a new top of the desired clone.



(r) Scion Grove Tree. A citrus nursery tree grown in accordance with 5B-48.07 from budwood taken from a registered parent tree or Budwood Foundation Grove tree and registered with the division as a source of budwood.

(s) Treatment or eradication area. An area where it has been determined that citrus canker exists or is believed to exist or is located in such proximity to an infection or infestation of the disease that destruction of infected or infested material or treatments must be made to eliminate the disease.

(t) Suspect citrus canker infested or infected plant. A plant which has been subjected to infestation or infection by its presence in an infested area or having been removed from an infested area within a given period of time. See (4) (a), (b) and (c) of this rule.

(u) USDA. United States Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

(2) Purpose of rule chapter. This rule provides guidelines for implementing actions necessary to eradicate citrus canker from Florida.

(3) Declaration of citrus canker as plant pest. Pursuant to Section 581.031(6), Florida Statutes, the citrus canker disease incited by *Xanthomonas campestris* pv. *citri* is declared to be a plant pest and a nuisance as well as any plant or other thing infested or infected therewith or that has been exposed to infestation or infection and therefore likely to communicate same.

(4) Infested or infected status of a citrus tree due to its origin from a quarantined nursery or quarantined stock dealer is determined as follows:

(a) All citrus trees from any nursery or stock dealer declared infested or infected since January 1, 1984, are considered as infested or infected and are referred to in this rule as suspect citrus canker infested or infected plants; or

(b) All citrus trees from any nursery or stock dealer for which there is evidence that the nursery or stock dealer was infested or infected prior to January 1, 1984, shall be considered to have been infested or infected 4 months prior to the suspected time of

infestation and are referred to in this rule as suspect citrus canker infested or infected plants; or

(c) All citrus trees from any nursery or stock dealer which may be found infested or infected shall be considered to have been subject to infestation or infection 4 months prior to the evidence of infestation of the subject nursery and are referred to in this rule as suspect citrus canker infested or infected plants.

(5) Procedures to be followed in nurseries where plants as described as suspect citrus canker infested or infected plants are found:

(a) Destroy by burning or other methods as may be prescribed by the USDA or the department, any plant as described in (4) (a), (b) or (c) above.

(b) Destroy by burning or by other methods that may be prescribed by the USDA or the department all citrus plants within 125 feet of the plant described in (4) (a), (b) or (c) above.

(c) All hand and mechanized equipment, clothing and personnel, entering an infested nursery, or one in which suspect citrus canker infested or infected plants are found, must be disinfected as directed by the USDA or department before exiting the nursery.

(6) Proceedings to be followed in citrus groves where suspect citrus canker infested or infected plants from an infested nursery have been placed:

(a) Any citrus plant found to be infested or infected with citrus canker will be destroyed by burning or other methods as may be prescribed by the USDA or the department, and the plants occupying the two plant spaces in every direction from the infested or infected plant shall be defoliated as directed by the USDA or the department.

(b) Citrus groves in which a plant positive for citrus canker is found shall be sprayed with an Environmental Protection Agency registered copper containing pesticide at the rate of at least  $\frac{3}{4}$  pound of actual copper per 100 gallons of water, after destruction of the infested or infected plants as in (a) above.

(c) Any suspect citrus canker infested or infected plant from an infested or infected nursery as described in (4) (a), (b) or (c) above, which upon examination is found to be apparently negative for citrus canker, shall be destroyed by burning or by other methods as prescribed by the USDA or the department. The surrounding four citrus plants in spaces adjacent to the suspect canker infested plant shall be sprayed with an Environmental Protection Agency registered copper containing pesticide at the rate of  $\frac{3}{4}$  pounds of actual copper per 100 gallons of water to be applied immediately after destruction of the suspect citrus canker infested or infected plant as in (a) above.

(d) All equipment, both hand and mechanized, clothing and personnel, entering an infested grove or one in which suspect citrus canker infested or infected plants are found, must be disinfected as directed by the USDA or department before exiting the nursery.

(7) Budwood from the G. F. Ward Scion Grove (S-608): Nurseries which have received budwood from the G. F. Ward Scion Grove (S-608) will be held under quarantine for one year from receipt of material and examined for citrus canker within at least 30-day intervals.

(8) Shipment status of citrus fruit from groves in which a suspect citrus canker infested or infected plant is found:

(a) In groves where a citrus canker infested or infected plant is found to be positive for citrus canker, after the completion of the procedures outlined in (6) (a) and (b) of this rule are met, fruit may be moved only to a plant for processing.

(b) In groves where a suspect citrus canker infested or infected plant is found to be negative for citrus canker, after the completion of the procedures outlined in (6) (c) and (d) of this rule, the fruit can be moved under limited permit as prescribed by the USDA or the department.

(9) Entry of unauthorized persons into a quarantined area. It shall be unlawful for any person to enter any area quarantined due to its status as infested or infected with citrus canker unless authorized to enter by the director of the Division of Plant Industry or his designated representative.

(10) Penalties for violation. Any person who shall violate any provision or requirement of this chapter shall be subject to the penalties of Sections 581.141 and 581.211, Florida Statutes. Specific Authority 120.54(9); 570.07(21), (23); 581.031(1), (4), (5) FS.

Law Implemented 570.07(2), (13), (21); 581.031(6), (7), (9), (15), (17); 581. 083; 581.101; 581.141; 581.211 FS.

History - New

NAME OF PERSON ORIGINATING THE EMERGENCY  
RULE: Dr. S. A. Alfieri, Jr., Director, Division of Plant Industry.  
NAME OF PERSON WHO APPROVED THE EMERGENCY  
RULE: Doyle Conner, Commissioner of Agriculture, State of  
Florida.

**FLORIDA DEPARTMENT OF AGRICULTURE  
& CONSUMER SERVICES**

TO: Mr. Bill Lambert, Jr.  
Mid Florida Growers, Inc.  
Rt. 1, Box 526  
Bowling Green, FL 33834

**IMMEDIATE FINAL ORDER**

The Florida Department of Agriculture and Consumer Services issues this Immediate Final Order and says:

**PARTIES**

1. The Florida Department of Agriculture and Consumer Services is an agency of the State of Florida charged with the responsibility of enforcing the laws relating to agriculture in Florida.

2. Mid Florida Growers, Inc. is a nursery as defined in Chapter 581, Florida Statutes, and the rules promulgated thereunder.

**AUTHORITY**

3. This order is issued pursuant to the provisions of Sections 570.07(21), 120.59 and 581.031(6), (7) and (17), Florida Statutes, Rule 5B-45 and Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code. (Copies of rules attached.)

**FINDINGS OF FACT**

4. Mid Florida Growers, Inc. is a nursery located in Hardee County, Florida, more particularly described as:

SE ¼ of SE ¼ of SE ¼ of Section 17,  
township 33 South, Range 25 East,  
consisting of 2 acres, more or less.

5. Mid Florida Growers, Inc. received citrus trees from, or propagated from, a nursery infested or infected with citrus canker, *Xanthomonas campestris* pv. *citri*.

6. The Citrus Canker Technical Advisory Committee has recommended, and the department adopted by emergency rules,

treatment and eradication procedures for nurseries which received citrus trees from nurseries or stock dealers declared infested or infected with citrus canker. The department will implement those procedures in Mid Florida Growers, Inc.

### **ACTION ORDERED**

7. Mid Florida Growers, Inc. is hereby designated a treatment or eradication area within the meaning of Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code.

8. All plants in Mid Florida Growers, Inc., received from a nursery or stock dealer declared infested or infected with citrus canker will be destroyed by burning or by other methods prescribed by the department or the United States Department of Agriculture (USDA).

9. In addition, all citrus plants within one hundred twenty five (125) feet of such plants will also be destroyed in like manner.

10. This eradication procedure will be accomplished within ten days of receipt of this order, or as soon thereafter as is practicable.

### **CONCLUSIONS OF LAW**

11. Article IV Section 4(f) of the Florida Constitution gives the Commissioner of Agriculture the supervision of matters pertaining to agriculture except as otherwise provided by law. He has authority under Section 570.07(21), Florida Statutes, to declare an emergency when such exists and promulgate rules which would be effective during the terms of such emergency.

12. Further, Chapter 581, Florida Statutes, gives the department broad powers in the containment, treatment or eradication of plant pests and diseases. Specifically, in Section 581.031, Florida Statutes, it has the power and duty to: (6) declare a plant pest or any plant infested or infected, or exposed thereto, a nuisance; (7) to declare a quarantine; and (17) to supervise the treatment, cutting and destruction of infested plant or plants reasonably exposed to infestation.

13. Finally, in the promulgation of Emergency Rules 5BER84-8 and 5BER84-9, the department established the procedures for setting out quarantine, regulated, and treatment or eradication

areas; movements of regulated articles; determination of the status of infested or infected citrus trees; sanitation methods and other conditions of quarantine and treatment. Rule 5B-45, Florida Administrative Code, also pertains.

14. On September 11, 1984, the U. S. Secretary of Agriculture declared an emergency because of citrus canker and authorized the transfer of such funds as are necessary to conduct a program to detect, identify and eradicate citrus canker wherever found. The United States Department of Agriculture also proposed an amendment to the "Domestic Quarantine Notices" by adding a new "Subpart Citrus Canker" to prevent the artificial spread of the disease into noninfested areas of the United States.

### **FINDINGS OF IMMEDIATE THREAT**

15. On August 27, 1984, citrus canker *Xanthomonas campestris* pv. *citri* was detected in a Central Florida citrus tree nursery. Citrus canker is one of the most destructive diseases of citrus and has been eradicated from the State of Florida one time in the early part of the 20th century at a cost of \$2,422,326.00. When the disease first appeared in Florida in 1914, drastic measures were taken to rid the state of the disease. These measures included the destruction of many citrus trees and contaminated articles. Florida was not declared free of the disease until 1927. In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.



**APPEALABILITY**

16. This order is appealable or enjoinalable from the date rendered.

Done and ordered at Winter Haven, Florida this 16th day of October, 1984.

**ROBERT A. CHASTAIN**  
General Counsel

**DOYLE CONNER**  
Commissioner of Agriculture

By: /s/ Charles Poucher  
Project Director

/s/ Gordon Johnson  
Gordon Johnson  
Deputy Project Director  
U.S. Department of Agri.

**FRANK A. GRAHAM**  
Resident Counsel  
Department of Agriculture  
and Consumer Services  
Room 515, Mayo Building  
Tallahassee, Florida 32301  
Phone: 904/488-6853

**FLORIDA DEPARTMENT OF AGRICULTURE  
& CONSUMER SERVICES**

TO: Mr. Joe Himrod  
Himrod & Himrod Citrus Nursery  
Rt. 1, Box 49A  
Bowling Green, FL 33834

**IMMEDIATE FINAL ORDER**

The Florida Department of Agriculture and Consumer Services issues this Immediate Final Order and says:

**PARTIES**

1. The Florida Department of Agriculture and Consumer Services is an agency of the State of Florida charged with the responsibility of enforcing the laws relating to agriculture in Florida.

2. Himrod & Himrod Citrus Nursery is a nursery as defined in Chapter 581, Florida Statutes, and the rules promulgated thereunder.

**AUTHORITY**

3. This order is issued pursuant to the provisions of Sections 570.07(21), 120.59 and 581.031(6), (7) and (17), Florida Statutes, Rule 5B-45 and Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code. (Copies of rules attached.)

**FINDINGS OF FACT**

4. Himrod & Himrod Citrus Nursery is a nursery located in Hardee County, Florida, more particularly described as:

S  $\frac{3}{4}$  of E  $\frac{1}{2}$  of SW  $\frac{1}{4}$  and the  
S  $\frac{3}{4}$  of SE  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of  
Section 8, Township 33 South,  
Range 25 East, consisting of  
0.6 acre, more or less.

4. Himrod & Himrod Citrus Nursery received citrus trees from, or propagated from, a nursery infested or infected with citrus canker, *Xanthomonas campestris* pv. *citri*.

6. The Citrus Canker Technical Advisory Committee has recommended, and the department adopted by emergency rules, treatment and eradication procedures for nurseries which received citrus trees from nurseries or stock dealers declared infested or infected with citrus canker. The department will implement those procedures in Himrod & Himrod Citrus Nursery.

### **ACTION ORDERED**

7. Himrod & Himrod Citrus Nursery is hereby designated a treatment or eradication area within the meaning of Emergency Rules 5BER84-8 and 5BER84-9, Florida Administrative Code.

8. All plants in Himrod & Himrod Citrus Nursery received from a nursery or stock dealer declared infested or infected with citrus canker will be destroyed by burning or by other methods prescribed by the department or the United States Department of Agriculture (USDA).

9. In addition, all citrus plants within one hundred twenty five (125) feet of such plants will also be destroyed in like manner.

10. This eradication procedure will be accomplished within ten days of receipt of this order, or as soon thereafter as practicable.

### **CONCLUSIONS OF LAW**

11. Article IV Section 4(f) of the Florida Constitution gives the Commissioner of Agriculture the supervision of matters pertaining to agriculture except as otherwise provided by law. He has authority under Section 570.07(21), Florida Statutes, to declare an emergency when such exists and promulgate rules which would be effective during the term of such emergency.

12. Further, Chapter 581, Florida Statutes, gives the department broad powers in the containment, treatment or eradication of plant pests and diseases. Specifically, in Section 581.031, Florida Statutes, it has the power and duty to: (6) declare a plant pest or any plant infested or infected, or exposed thereto, a nuisance; (7) to declare a quarantine; and (17) to supervise the treatment, cutting and destruction of infested plant or plants reasonably exposed to infestation.

13. Finally, in the promulgation of Emergency Rules 5BER84-8 and 5BER84-9, the department established the procedures for setting out quarantine, regulated, and treatment or eradication areas; movements of regulated articles; determination of the status of infested or infected citrus trees; sanitation methods and other conditions of quarantine and treatment. Rule 5B-45, Florida Administrative Code, also pertains.

14. On September 11, 1984, the U. S. Secretary of Agriculture declared an emergency because of citrus canker and authorized the transfer of such funds as are necessary to conduct a program to detect, identify and eradicate citrus canker wherever found. The United States Department of Agriculture also proposed an amendment to the "Domestic Quarantine Notices" by adding a new "Subpart Citrus Canker" to prevent the artificial spread of the disease into noninfested areas of the United States.

### **FINDINGS OF IMMEDIATE THREAT**

15. On August 27, 1984, citrus canker *Xanthomonas campestris* pv. *citri* was detected in a Central Florida citrus tree nursery. Citrus canker is one of the most destructive diseases of citrus and has been eradicated from the State of Florida one time in the early part of the 20th century at a cost of \$2,422,326.00. When the disease first appeared in Florida in 1914, drastic measures were taken to rid the state of the disease. These measures included the destruction of many citrus trees and contaminated articles. Florida was not declared free of the disease until 1927. In view of the destructive nature of this pathogenic bacterial organism and in view of its pressing occurrence within the State of Florida, immediate steps must be taken to eradicate citrus canker before the infected area expands and results in economic disaster for Florida's 1.2 billion dollar citrus industry and ultimately adversely affects the welfare of the citizenry of the State of Florida. In view of the specific facts and reasons above mentioned, and in accordance with the constitutional authority conferred upon the Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and with the authority stated in Florida Statutes, Sections 570.07(21) (to declare an emergency) and 581.031(7), I do hereby find that an immediate danger to the public health, safety and welfare exists, justifying the issuance of this Immediate Final Order.

**APPEALABILITY**

16. This order is appealable or enjoicable from the date rendered.

Done and ordered at Winter Haven, Florida this 16th day of October, 1984.

**ROBERT A. CHASTAIN**  
General Counsel

**DOYLE CONNER**  
Commissioner of Agriculture

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

NO. 87-2123

DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida,

Petitioner,

v.

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITIONER

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Rule 36.4, Rules of the Supreme  
Court of the United States 1

### INTEREST OF AMICI

Amici respectfully file this brief in support of the petition for writ of certiorari and pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

The states which have joined as amici curiae in this case exercise a broad range of regulatory powers within their respective jurisdictions. Under the police power, every state must at times take swift and uncompromising measures to combat the spread of disease or to prevent its occurrence. Such measures have historically included the destruction of property suspected of being diseased or capable of transmitting disease or the discontinuance of certain uses of property which may be injurious to the public health, safety and welfare. Historically, too, the law of the land has been that government owed no compensation to the property owner for the taking of such action.

In this respect, this Court has observed that the police power is "one of the most essential powers of government, one that is the least limitable." Hadacheck v. Los Angeles, 239 U.S. 394, 410 (1915).

The decision of the Florida Supreme Court in Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988), nullifies this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928). In so doing it imposes an unprecedented limitation upon the exercise of the State's police power. The Florida Supreme Court holds the State must pay compensation for the destruction of young citrus trees which had been exposed to the disease known as citrus canker and which the State, relying on scientific opinion, believed capable of harboring and further spreading the disease. As noted in the petition for certiorari, the potential

liability of the State in this and similar cases now reaches into the hundreds of millions of dollars. (Petition at 18)

If the decision below is allowed to stand, it will deny effect to Miller v. Schoene and seriously inhibit the State in exercising its "most essential power" in the area most vital to the health of its citizens and industry.

Because Miller v. Schoene deals specifically with uncompensated destruction of property pursuant to the police power to protect a state's dominant agricultural industry, clarification by this Court of its continuing precedential validity is essential to guide Florida and other amici states in taking like actions, particularly actions (as the one here) in concert with and under the



direction of an agency of the United States Government.<sup>1/</sup>

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<sup>1/</sup> The United States Department of Agriculture led the decision to destroy trees in this case and in the entire canker eradication program pursuant to its statutory authority in Title 7 U.S.C. §147a et seq. See, e.g. 49 Fed. Reg. 41, 268 (Oct. 22, 1984); 49 Fed.Reg. 36, 623 (Sept. 19, 1984). As such, this Court may desire that the Solicitor General of the United States express his views on the impact of the decision below on the continuing validity of Miller v. Schoene and the impact of the decision below on joint federal-state eradication programs. See, generally, Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, June 30, 1988 (\_\_\_\_ Fed. Reg. \_\_\_\_).

### SUMMARY OF ARGUMENT

Acting under the police power, States may require the destruction or prohibit the use of property found injurious to the public health, welfare and safety. As long as the object of state action is to protect the public welfare, and the action itself is not unreasonable or arbitrary, no compensation is due the owner of the property under the Takings Clause. In this case, Florida acted to control the spread of citrus canker by destroying young nursery trees which had been exposed to the disease and which were believed capable of harboring and spreading the disease. On these facts, and in the absence of any conclusion that the State's action was arbitrary or unreasonable, the Florida Supreme Court found a "taking." The decision ignores, and thus implicitly overrules in Florida, this Court's decision in Miller v. Schoene, supra. Because Miller v. Schoene

upheld the constitutionality of a statute identical in effect to the one here at issue, clarification by this Court of Miller v. Schoene's continuing precedential validity is essential to guide governments in responding to similar emergency conditions which such governments have statutorily determined to create an unacceptable risk to public health and safety or a major economic resource.

#### ARGUMENT

I. THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH MILLER V. SCHOENE AUTHORIZING THE UNCOMPENSATED DESTRUCTION OF NUISANCE PROPERTY UNDER THE POLICE POWER.

The decision of the Florida Supreme Court effectively nullifies the landmark decision of the Court in Miller v. Schoene,

supra.<sup>2/</sup> In Miller the Court considered the constitutionality of a Virginia statute which mandated the uncompensated destruction of any cedar tree "which is or may be the source . . . of the communicable plant disease known as cedar rust." 276 U.S. at 277. Cedar rust disease, although not harmful to cedar trees themselves, could be destructive to the fruit and foliage of the apple tree, a principal agricultural industry of Virginia. 276 U.S. at 278-279.

This case involves a Florida statute identical in effect which mandated the destruction of plants "capable of harboring plant pests . . . reasonably exposed to

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<sup>2/</sup> The Florida Supreme Court did not cite Miller v. Schoene in its decision; however, it was presented and briefed to the court. Initial Brief of Petitioner at 14-15; Respondents' Answer Brief at 27.

infestation" and regulations thereunder which provided for eradication of plants "subjected to infestation or infection." Florida Statute 581.031(17) (1983);<sup>3/</sup> Florida Administrative Code, Emergency Rule

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<sup>3</sup>Section 581.031(17), Florida Statutes (1983), granted the state Department of Agriculture and Consumer Services the power:

(17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests or noxious weeds, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they came from a situation where they were reasonably exposed to infestation, when necessary to prevent or control the dissemination of plant pests or noxious weeds or to eradicate same and to make rules therefor. (Emphasis added.)

5 BER84-9 (effective Sept. 21, 1984)  
(Citrus Canker Eradication).

This Court in Miller v. Schoene unanimously held that the State did not exceed its constitutional powers by deciding to destroy one class of property (healthy cedar trees) in order to save another which, in the judgment of the Virginia legislature, was of greater value to the public (apple trees).<sup>4/</sup> As Justice (later Chief Justice) Stone explained for the Court: "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing

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<sup>4/</sup> The Virginia statute at issue in Miller v. Schoene provided for uncompensated takings. The Florida law here at issue permitted limited compensation.

characteristics of every exercise of the police power which affects property." 276 U.S. at 280, (case citations omitted). In other words, the Court held the State may destroy trees without regard to whether they are in fact infected or healthy where the public interest is served. "The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards." 276 U.S. at 278-79 (emphasis supplied).

**A. The Florida Statutory and Regulatory Framework Closely Parallels the Virginia Statute in Miller v. Schoene.**

Florida's actions, now held to be an unconstitutional taking, were completely consistent with the facts and rationale of Miller. Florida responded to the discovery of the presence of citrus canker in the



State in 1984 under authority of sections 570.07(21) and 581.031(6), (7) and (17), Florida Statutes (1983). (See Appendix to Petition for Certiorari at A 22 et seq.) These statutes authorized the Florida Department of Agriculture and Consumer Services to, inter alia, declare an emergency, to adopt rules and regulations effective during the emergency, to declare a plant pest or plants infested by a pest to be a nuisance, and to quarantine or destroy property affected by plant pests.

Florida's Department of Agriculture and Consumer Services accordingly adopted emergency rules practically indistinguishable from the Virginia statute at issue in Miller. The rules declared citrus canker to be a plant pest and a public nuisance and required the destruction of both infected plants and "suspect" plants. A "suspect citrus canker infested or infected

plant" was defined to include a plant which had been subjected to infection by its presence in an infested area or which had been removed from an infested area within a specified time period. (Appendix to Petition for Certiorari, A 40). Thus, like the Virginia law prohibiting the keeping of cedar trees which "are or may be" a source of cedar rust, Florida required the destruction of citrus trees which were known to have been exposed to citrus canker.

**B. Nevertheless, Actions Taken Directly Pursuant to The Florida Statutory and Regulatory Framework Were Held, Contrary to Miller v. Schoene, To Be An Unconstitutional Taking.**

Pursuant to the rules and emergency orders issued by the Department, the respondent citrus nurseries were required to burn nursery stock which they had obtained

from Ward's Nursery, where the citrus canker had been discovered. In ordering the destruction of nursery stock that had been exposed to the canker disease, Florida was acting on the best available scientific information. Destruction of these trees to prevent the spread of the disease was recommended by the Citrus Canker Technical Advisory Committee, a group established jointly by the United States Department of Agriculture and the Florida Department of Agriculture and Consumer Services. At trial, plaintiffs' own expert witness, who was a member of this committee, admitted that he had recommended and voted in favor of destroying exposed trees. The State's witnesses testified that the State's actions were based on the assumption that it was dealing with a very severe form of citrus canker. Available scientific literature indicated that the citrus canker

bacteria could "lay dormant" on a plant for eighteen months and perhaps up to three years.

The exposed nursery stock belonging to Mid-Florida Growers and to Himrod & Himrod manifested no sign of the disease before it was burned in October 1984. While stating that "Defendant's [the State's] actions with respect to Plaintiffs' nursery stock were within its police power," the trial court held the State liable for a taking, reasoning that:

The most that can be said for the Defendant is that the Plaintiffs' nursery stock was obtained from a single source where some form of citrus canker was detected. The Plaintiffs' careful methods of operation, and the fact that no citrus canker in any form was discovered in the Plaintiffs' nursery stock, leads to the legal [sic] conclusion that no citrus canker was presented. It is the responsibility of the state to make reasonable efforts to ascertain the presence of infection or disease, under the circumstances of this case. Therefore, a taking

has occurred in this instance and Plaintiffs are entitled to full and just compensation.

521 So.2d at 102. Thus, ignoring the testimony that the State had relied on scientific opinion holding that destruction of exposed nursery stock was necessary to halt the spread of canker, the trial court in effect ruled that the State could not constitutionally destroy stock it could not prove was diseased.

Upon review, both the Second District Court of Appeal and the Florida Supreme Court found that the State had validly exercised its police power. Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 505 So.2d 592, 595 (Fla. 2d DCA 1987), and Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. 521 So.2d 101, 103 (Fla. 1988). Nevertheless, both the "taking" finding and its rationale were affirmed.

The Florida Supreme Court explicitly sanctioned the trial court's ruling in stating:

[W]e hold that full and just compensation is required when the state, pursuant to its police power, destroys healthy trees. Because a taking occurred in the instant case when the healthy trees were destroyed, the nursery owners must be compensated.

The Chief Justice of the Florida Supreme Court dissented, reasoning that:

[A] review of the department's actions should not be made on hindsight. The department had the duty to take emergency measures to prevent an immediate harm--the spread of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this

light the evidence fails to support a claim for inverse condemnation.

521 So.2d at 105-106, McDonald, Chief Justice, dissenting.

The Chief Justice's dissent is completely consonant with Miller v. Schoene and the analysis this Court has historically applied to nuisance cases.<sup>5/</sup> Neither the trial court, the Second District Court of Appeal nor the Florida Supreme Court found that the destruction of the exposed trees was either unnecessary or an unreasonable, arbitrary means of controlling the spread of citrus canker.

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<sup>5/</sup> The decisions of this Court have repeatedly emphasized the judicial deference due a state's determination that certain conditions or certain property constitute a public nuisance. See Mugler, supra, 123 U.S. at 669; Reinman v. Little Rock, supra, 237 U.S. at 176-177; and Powell v. Pennsylvania, 127 U.S. 678, 685-686 (1888).



In fact, it does not differ in character from the destruction of property to contain a fire or pestilence or the destruction of cedar trees to prevent the spread of a fungus to apple trees.<sup>6/</sup> Florida chose to destroy one class of property to preserve another, a permissible constitutional choice according to the express language of Miller, supra. "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the

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<sup>6/</sup> See also Slocum v. United States, 515 F.2d 237 (5th Cir. 1975), upholding an order of the U.S. Department of Agriculture requiring destruction of birds infected with or exposed to VVND, a communicable avian disease.

police power which affects property." Miller v. Schoene, 276 U.S. 279-280.

Moreover, no court found faulty the State's methodology for determining which young trees had been exposed to the canker. The plaintiff nurseries attacked neither the Florida law empowering the Department to act nor the emergency rules the Department adopted for the control of canker. Indeed, all three courts judging this case found the State had properly exercised its police power.<sup>7/</sup> To find a taking on these facts directly conflicts

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<sup>7/</sup> As the Chief Justice's dissent points out, two Florida district courts of appeal had upheld the constitutionality of the rule authorizing the destruction of healthy but suspect citrus plants. See, Denney v. Connor, 462 So.2d 534 (Fla. 1st DCA 1985), and Nordmann v. Florida Department of Agriculture and Consumer Services, 473 So.2d 278 (Fla. 5th DCA 1985), cited at 521 So.2d 106.

not only with this Court's holding in Miller v. Schoene, but also with Mugler v. Kansas, 123 U.S. 623 (1887), wherein the Court ruled that property may be destroyed or its use prohibited

for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, [and such] cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit  
. . . .

123 U.S. at 669.<sup>8/</sup>

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<sup>8/</sup> See also, Reinman v. Little Rock, 237 U.S. 171 (1915) (prohibition of livery stables deemed "productive of disease" within certain areas of the city); Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (prohibition of brickyard within city limits); Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) ("The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established.").

II. BECAUSE MILLER V. SCHOENE HAS BEEN  
RECOGNIZED AS A LEADING "TAKING"  
DECISION OF THIS COURT, IMMEDIATE  
REVIEW IS ESSENTIAL TO CLARIFY ITS  
PRECEDENTIAL VALIDITY.

Prior to the decision below, Miller v. Schoene has been uniformly followed as the definitive determination that states may take reasonable measures to prevent unacceptable risks to public health and safety or a major economic resource. Just last year, this Court again cited Miller v. Schoene with approval in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. \_\_\_\_, 107 S.Ct. 1232 (1987) ("it was clear that the state's exercise of its power to prevent impending danger was justified, and did not require compensation"). 480 U.S. at 107. Also last year the rule of Miller v. Schoene was again applied to measures to prevent the dissemination of plant and animal diseases without having to provide compensation.

See, e.g., Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 915 (3rd Cir. 1987) ("The opinion of the Court [in Keystone] strongly reasserted the authority of cases such as Miller v. Schoene . . . recognizing government police power over property which could, because of disease, cause harm to others") (emphasis added); see also Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1101 n.5 (Cl.Ct. 1977) ("Nor does claimant contend that it is entitled to just compensation in the constitutional sense. It is certainly doubtful that such a claim would stand. See, Miller v. Schoene . . . upholding the destruction, without just compensation, of cedar trees passing on a communicable plant disease").

The election of the Florida Supreme Court to ignore this continuous line of authority requires this Court's careful consideration as to the need for its

intervention to maintain the precedential validity of Miller v. Schoene. Little more can be done under the decision below to combat the spread of disease than destroy sources proven to be infected. A suspected source must be within a state's reach without incurring incalculable compensation for private loss. In fact, by acting promptly to destroy a suspect source, the State forfeits the opportunity to ever prove the source infected. The Second District Court of Appeal seemed to recognize the dilemma posed by young nursery trees exposed to the disease:

We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether

canker is present in healthy trees. (Emphasis added.)

Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 505 So.2d 592, 595 (Fla. 2d DCA 1987). Apparently, though not explicitly stated, the only constitutional course of action the court thought open to the State in attempting to control a disease which may remain dormant for months was to attempt to monitor the condition of the many millions of young trees that had been exposed to the canker disease. The impossibility of continually inspecting and testing that number of trees over eighteen months or more is obvious. Moreover, federal authority in this State holds that the State may be liable for a taking by failing to take adequate action to prevent the exposure of the state citrus industry to the canker disease. Florida Growers Association v. United States Department of Agriculture,



554 F. Supp. 633 (S.D. Fla. 1982). These contrary state and federal holdings place Florida in a dilemma that only this Court can resolve.

A productive and healthy citrus industry is vital to Florida. In acting to eradicate a dangerous and virulent disease, whether plant or animal, prompt action may mean the difference between success and failure. Agencies charged by law with the responsibility to control and eliminate infectious diseases must be permitted to take reasonable and prompt action. Compensation for the destruction of nursery plants exposed to citrus canker disease should not be constitutionally compelled unless it can be shown that the "real object [of destruction] is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of

law." Mugler, supra, at 669; or that the action is an unreasonable and arbitrary exercise of the power of regulation. Reinman, supra, at 177.

As the record of this case will show, the plaintiff nurseries, Mid-Florida Growers and Himrod & Himrod, did not even attempt to make such a showing. They are not, therefore, constitutionally entitled to compensation.

#### CONCLUSION

The decision of the Florida Supreme Court conflicts directly with decisions of this Court. As such, it is a marked departure from established case law recognizing the power of the state to protect the public health, safety and welfare and a constitutionally unwarranted restraint upon the exercise of that power. Curtailing the power of the state to fight disease threatens the livelihood

and perhaps ultimately the lives of the State's citizens. The amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Florida Supreme Court.

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**IN THE  
Supreme Court of the United States**

**OCTOBER TERM 1987**

**(3)**

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**No. 87-2123**

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**DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida,**

*Petitioner,*

**v.**

**MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,**

*Respondents.*

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**RESPONDENTS' BRIEF IN OPPOSITION TO  
CERTIORARI AND APPENDIX**

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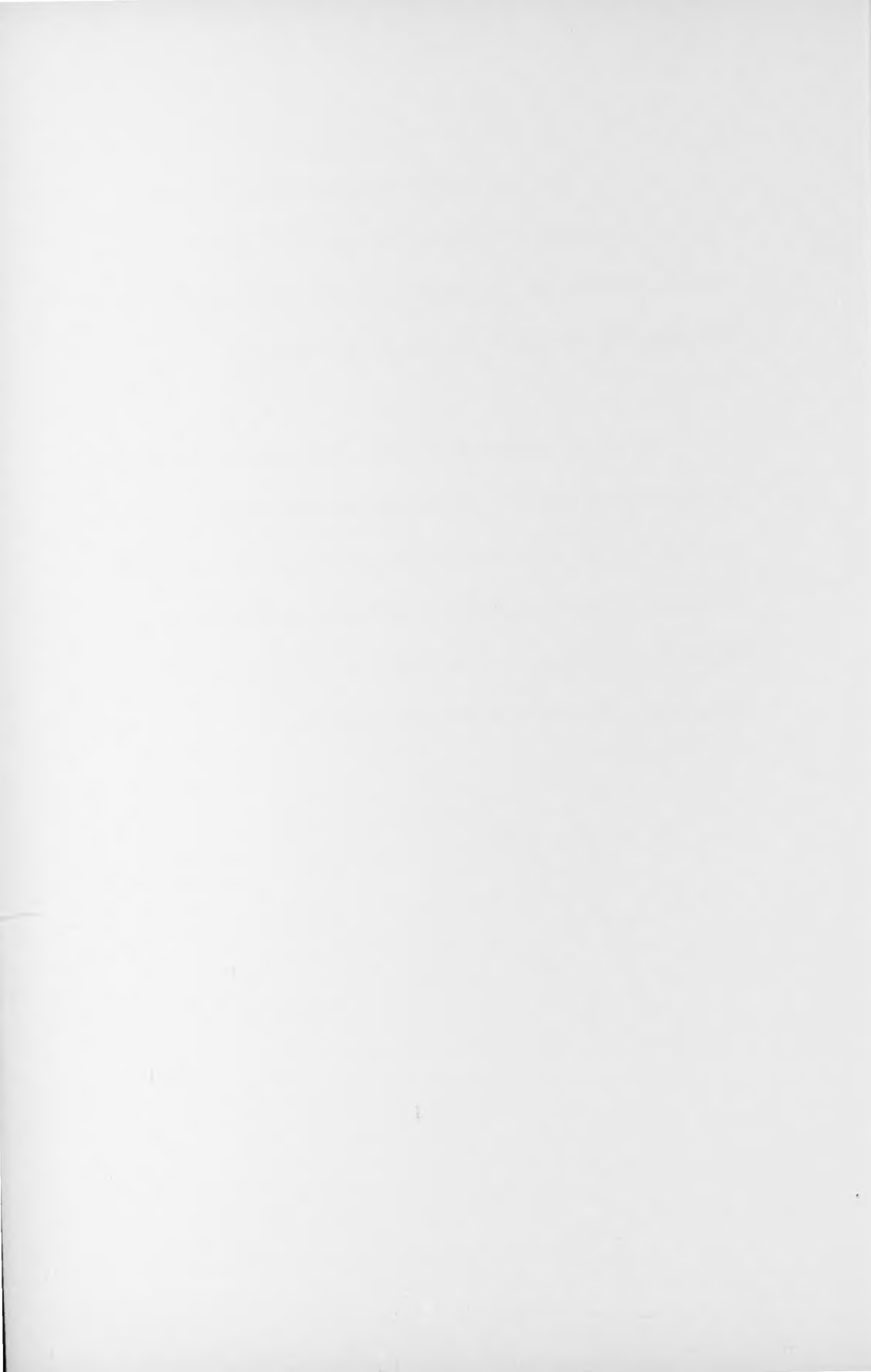
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## QUESTION PRESENTED

The Petition misstates the question presented. We restate the question, presenting reasons for the clarification and reserving the jurisdictional arguments below.

Is there a taking of private property for which compensation must be paid when the State, acting under its police power to promote state economic interests, unilaterally declares an emergency and destroys valuable citrus trees which were healthy and harmless, and when no imminent danger actually existed to warrant destruction?



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## **STATEMENT OF THE CASE**

The Florida Department of Agriculture and Consumer Services (the "Department") seeks certiorari to review a decision of the Florida Supreme Court that required it to compensate owners of healthy citrus trees which had been destroyed by the state's canker eradication program. Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., et al., 521 So.2d 101 (Fla. 1988) (Petition Appendix A-6). The Florida Supreme Court affirmed a Florida District Court of Appeal decision which, in turn, had affirmed a state trial court's decision that the destroyed trees were healthy and that their taking required compensation. State of Florida, Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., et al., 505 So. 2d 592 (Fla. 2d DCA 1987) (Petition Appendix A-10).

The Florida Supreme Court found that compensation was required because the destruction of the healthy trees was not ultimately a disease control measure to prevent public harm, but a measure to maintain public confidence in the state citrus industry where a bacterial disease was suspected,





but never actually present at Respondents' nurseries. The Court held:

The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court's conclusion that destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm. . . . Although this factor alone may not be conclusive, we have previously recognized that if a regulation creates a public benefit it is more likely that there is a taking. See Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla.), cert. denied sub nom. Taylor v Graham, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). . . . A taking of private property for a public purpose which requires compensation may consist of an entirely negative act, such as destruction. See, e.g., Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957) (destruction of healthy citrus trees required compensation).

Petition Appendix A-3.

The Department attempts to squeeze an important federal question from that decision. The Petition's long discussion of the "facts," (Petition at 7-14) including references to the United States Department of Agriculture<sup>1</sup>

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<sup>1</sup>The Petition mentions the role of the United States Department of Agriculture (USDA) in helping to fund canker eradication measures and adopting

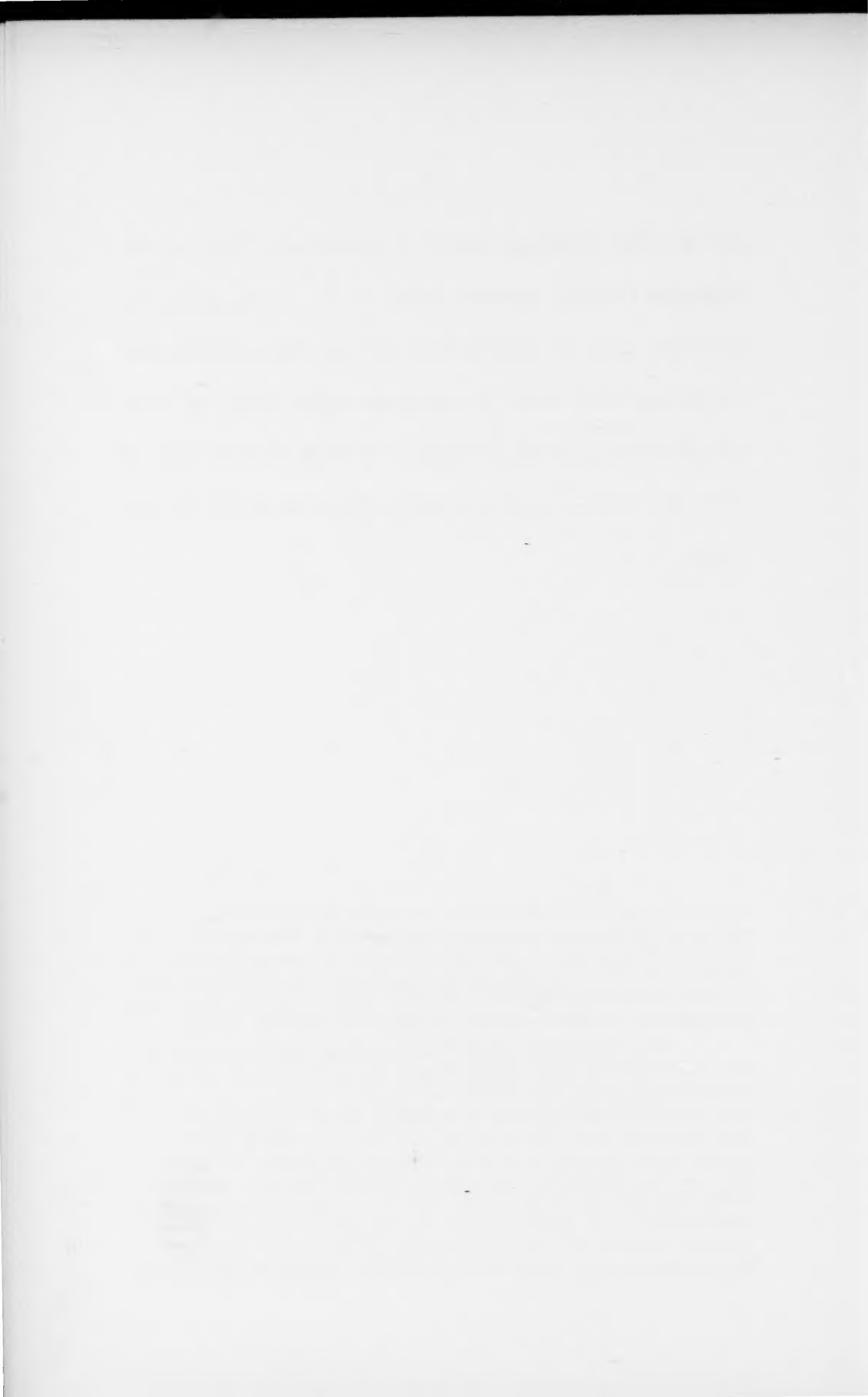


and to other pending suits,<sup>2</sup> is irrelevant. The Florida Supreme Court's opinion alone is the focal point for certiorari. As we demonstrate below, that opinion, and subsequent state court proceedings based solely on state constitutional grounds, present no conflict of authorities on important federal questions, and warrant no review by this Court.

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rules regulating interstate movement of citrus products. (Petition at 11-13, 18). These observations form no part of the record or the issues presented in the Florida courts. Even if properly raised below, however, the USDA's role would not create a federal issue since no challenge to its powers or duties is presented, and no relief of any kind is or could be sought against USDA in state court.

<sup>2</sup>The Department's potential liability in other cases likewise forms no part of the record or issues presented here. If the Department's precipitous destruction of healthy and harmless citrus plants inflicted losses of this magnitude on Florida businesses, destroying investments and employment, and these businesses remain uncompensated after four years, then the Department's concern should naturally lie with the victims of this action. As the Florida Supreme Court observed in oral argument, whatever liability is established is likely to be borne by the state citrus industry as a whole in the form of an additional tax. Is it possible that the impetus for this Petition comes from powerful interests in the state citrus industry, who benefited economically from the eradication program but do not want to share the resulting economic burden?



## SUMMARY OF ARGUMENT

Certiorari should be denied because:

1. This case presents no case or controversy for this Court. The trial on the issue of compensation due has already taken place in the state trial court, and the amount of compensation has been determined there under state law alone. Whatever review this Court may make cannot affect the parties' rights as determined in this case under state law.

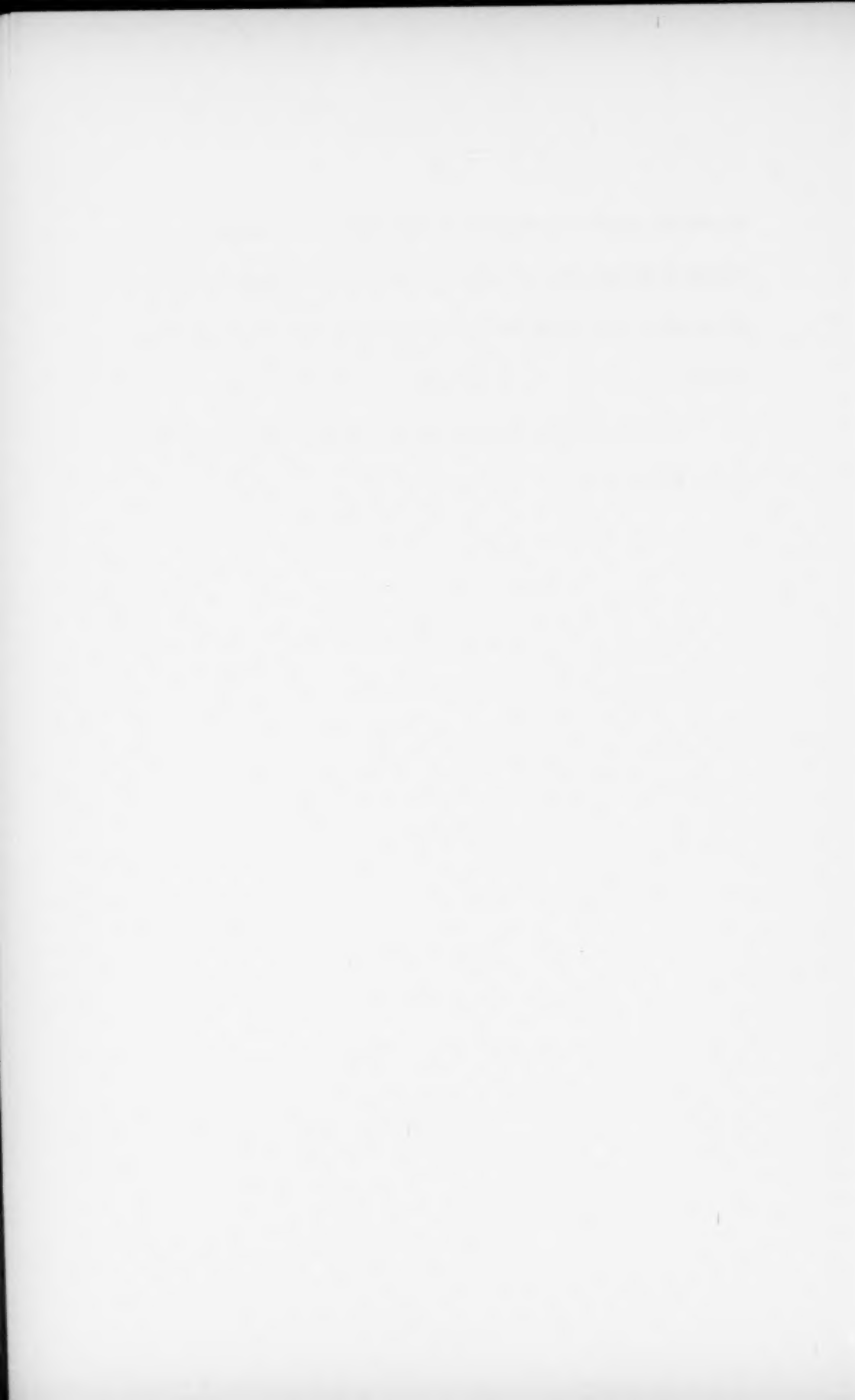
2. The decision below rests upon adequate and independent state grounds. The Florida Supreme Court cited primarily to state court decisions, and to the state constitution, as freestanding authority for its holding. Other proceedings in the record, as well as reference to Florida law on condemnation generally, support the proposition that state law supplied the rule of decision here.

3. The decision below is not inconsistent with other decisions on the taking issue. The burning of Respondents' healthy citrus trees was not undertaken to control disease, because there was no showing that they were diseased or even that they were exposed to disease and presented imminent danger. The purpose of the burning was



to restore public confidence in the state citrus industry. The physical destruction of valuable property for such a purpose presents a clear case for compensation, and does not merit review.

Each of these reasons is sufficient in itself to justify denial of the writ.





## ARGUMENT IN OPPOSITION TO WRIT

### I. The Decision Below Presents no Case or Controversy for This Court

The Petition for Writ of Certiorari should be denied because this case is moot for purposes of review by this Court.

On January 21, 1988 the Florida Supreme Court rendered its opinion that the Department is required to pay full and just compensation to these Respondents. Petition Appendix A-6. The Florida Supreme Court did not stay its decision, however, but permitted the trial on compensation to proceed. On March 22 and 23, 1988, the trial to determine the amount of compensation, based solely on the Florida Constitution, was held in the state trial court. On April 1, 1988, the Florida Supreme Court denied rehearing. Petition Appendix A-9. On April 26, 1988, the trial court entered its judgment in the amount of \$1,943,458.00. See Respondents' Appendix A- 26. The Department has appealed that judgment to the District Court of Appeal.

The Department has acknowledged the existence of these proceedings:



In March of 1988, a Pre-Trial Order was entered [in the state trial court] which provided that Petitioner was obligated as a matter of law to pay full and just compensation to Respondents for their losses in accordance with the Constitution of the State of Florida. As a result, at the trial for damages held in March 1988, the damages issue was tried without reference to the Fifth Amendment and the Jury Instructions were based exclusively on the Florida Constitution.

Petition at 5.<sup>3</sup>

Consequently any decision by this Court would not affect the rights of the Department and Respondents in this case. The Respondents have already prevailed at trial on non-federal grounds. If this Court granted certiorari and reversed the Florida Supreme Court ruling, the Respondents' state constitutional damage judgment would still stand.

Article III, Section 2 of the United States Constitution requires a case or controversy. "[F]ederal

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<sup>3</sup> The Pretrial Order contained the following statement which was read to the jury:

The State of Florida, Department of Agriculture and Consumer Services is therefore obligated, as a matter of law, to pay full and just compensation to the Plaintiffs for their losses in accordance with the Constitution of the State of Florida. This determination. . . may not be questioned in this proceeding.

Respondents' Appendix A- 23.



courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

In DeFunis the Court declined to decide the merits because "without regard to the ultimate resolution of the issues in this case, DeFunis will remain a student in the Law School. . . ." 416 U.S. at 316-17. Here, without regard to the ultimate resolution of the issues presented by the Department, the Respondents' right to compensation has already been decided solely upon state law and state law will remain the applicable standard in the dispute in all further proceedings.

The Department apparently recognizes the case it is presenting here is moot. It concedes "no federal issue was raised in the subsequent trial on damages." Petition at 6. Nevertheless, it asks this Court to grant certiorari based upon the fact that the "Department is already defending eleven citrus canker cases," and it may have substantial liability "to these plaintiffs and other potential plaintiffs. . . ." Petition at 6.



Respondents have already established and won their claim under the state constitution. If the Department raises and preserves federal questions in its other cases, perhaps one of them may present an actual case or controversy for this Court's consideration. This case does not meet the requirements of Article III, Section 2.

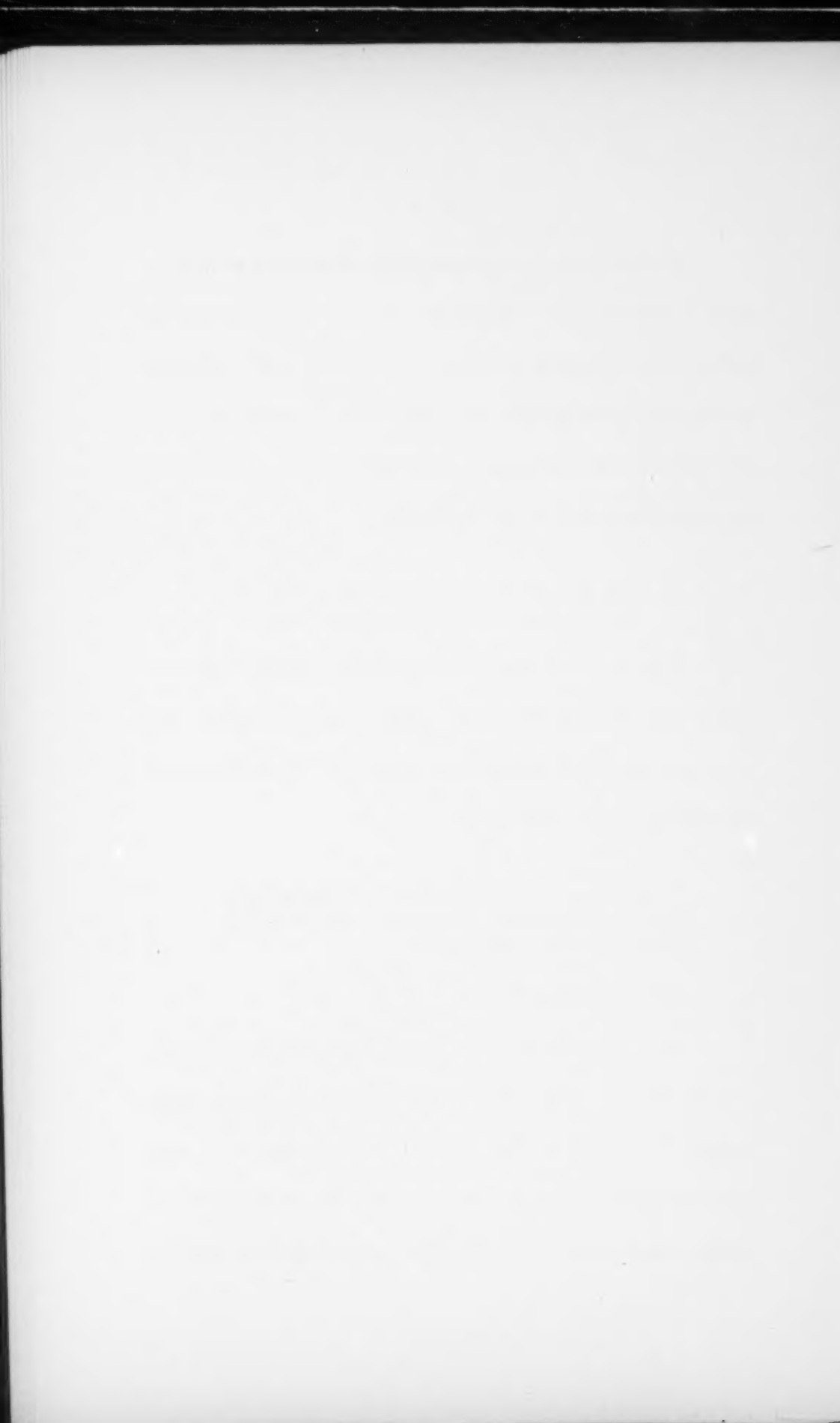
## II. The Decision Below Rests Upon An Adequate and Independent State Ground

The certified question before the Florida Supreme Court was whether the state could "destroy healthy but suspect citrus plants without compensation." The Court said no, relying on two state cases:

[C]onsistent with our decisions in State Plant Board and Corneal, we answer the certified question in the negative.

Petition Appendix A-5.

This passage refers to State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), and Corneal v. State Plant Board, 95 So.2d 2 (Fla. 1957). These cases held that compensation is due the owner when the State destroys healthy citrus trees that do not present any imminent danger,





for the purpose of protecting other trees of the same species. Both Smith and Corneal expressly construed the predecessor of current Article X, Section 6, Florida Constitution, which guarantees "full compensation" for private property taken. Smith, *passim*; Corneal, 95 So.2d at 4.

The Court observed that Smith was "a case involving circumstances similar to the present case." Petition Appendix A-4. The Court rejected the Department's attempt to distinguish Smith, noting:

Because Article X, Section 6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss.

Petition Appendix A-4.

This citation to the Florida Constitution confirms that an adequate and independent state constitutional basis exists for the decision.

The Florida Supreme Court's opinion does cite to four federal cases, in addition to nine state cases. None of the federal cases is cited as freestanding authority for any holding. Each federal citation serves an explanatory, as opposed to expositive, purpose in the opinion. The presence



of such citations does not establish that federal law was dispositive.<sup>4</sup>

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that when a state court decision fairly appears, on its face, to rest primarily on federal law or to be interwoven with federal law, and there is no "plain statement" enunciating adequate and independent state grounds, this Court may assume, as the most reasonable explanation, that the decision was based on federal grounds. In Michigan v. Long, this Court's assumption that no independent state law ground existed was based on the face of the state court's opinion. It noted that the state court's only reference to state law cited state and federal constitutional provisions together.

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<sup>4</sup>The absence of controlling federal issues is reflected in other portions of the record in the Florida courts. The Respondents' Second Amended Complaint (Respondents' Appendix A-1) the Department's Answer (A-7), the Pretrial Stipulation (A-10), and the certified question considered by the Florida appellate courts all discuss compensation with out reference to federal grounds. This Court has held that a demand for compensation which does not specify federal or state grounds is not deemed to raise a federal issue. Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U.S. 326 (1913).

Moreover, Respondents requested attorney's fees in the Florida courts based solely on state law grounds (A -115). The Florida Supreme Court's order granting attorney's fees, Petition Appendix A-9, could only have been based on a determination of liability for taking under state law.

Finally, as noted above the trial court's Pretrial Order relies solely on the Florida Constitution as the basis for awarding compensation (A -23), as did the entire trial proceeding.



Id. at 1037. It noted that the state courts relied exclusively on federal cases (such as Terry v. Ohio) and did not cite a single state case. Id. at 1043. It noted that the state court declared that the lower state court's decision was based on a misapplication of Terry v. Ohio principles. Id. at 1044.

No such features appear in the instant opinion of the Florida Supreme Court. On the contrary, state court decisions and the state constitution are cited as freestanding authority for the holding. This decision does not appear on its face to rest primarily on federal law or to be interwoven with federal law, and thus affords no grounds for the assumption that it is based on federal law.<sup>5</sup>

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<sup>5</sup>An evaluation of the context of state law also reveals that Florida law provides greater protection to property owners than the United States Constitution requires. Compare the Fifth Amendment ("just compensation") with Article X, Section 6, Florida Constitution ("full compensation"). See Sheppard, Compensation in Florida Condemnation Proceedings, 14 U.Fla.L.Rev. 28, 29 (1961) (citing to dissenting opinion comparing "just" and "full" compensation standards in Central Hanover Bank and Trust Co. v. Pan American Airways, 137 Fla. 808, 824, 188 So. 820, 826 (1939)). Florida practitioners consider state law to be more favorable to the property owner in condemnation actions than federal law. See Weiner, "Distinctions Between Florida and Federal Practice," Florida Eminent Domain Practice and Procedures (Fla. Bar 4th Ed. 1988). In this jurisprudential context, it is commonplace for condemnees to seek redress in state courts under state law, but highly irregular that a state agency condemnor would seek refuge under federal law. There is no requirement, of course, that reduces State property rights guarantees to the minimum standard required by the United States Constitution. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L.Rev. 489 (1977).



The permissible assumption under Michigan v. Long does not displace the petitioner's normal burden to demonstrate the basis for jurisdiction. Id., n. 8 at 1042. In this case, no jurisdiction is shown, either because any possible federal issue is moot, or because there is an adequate and independent state ground.<sup>6</sup>

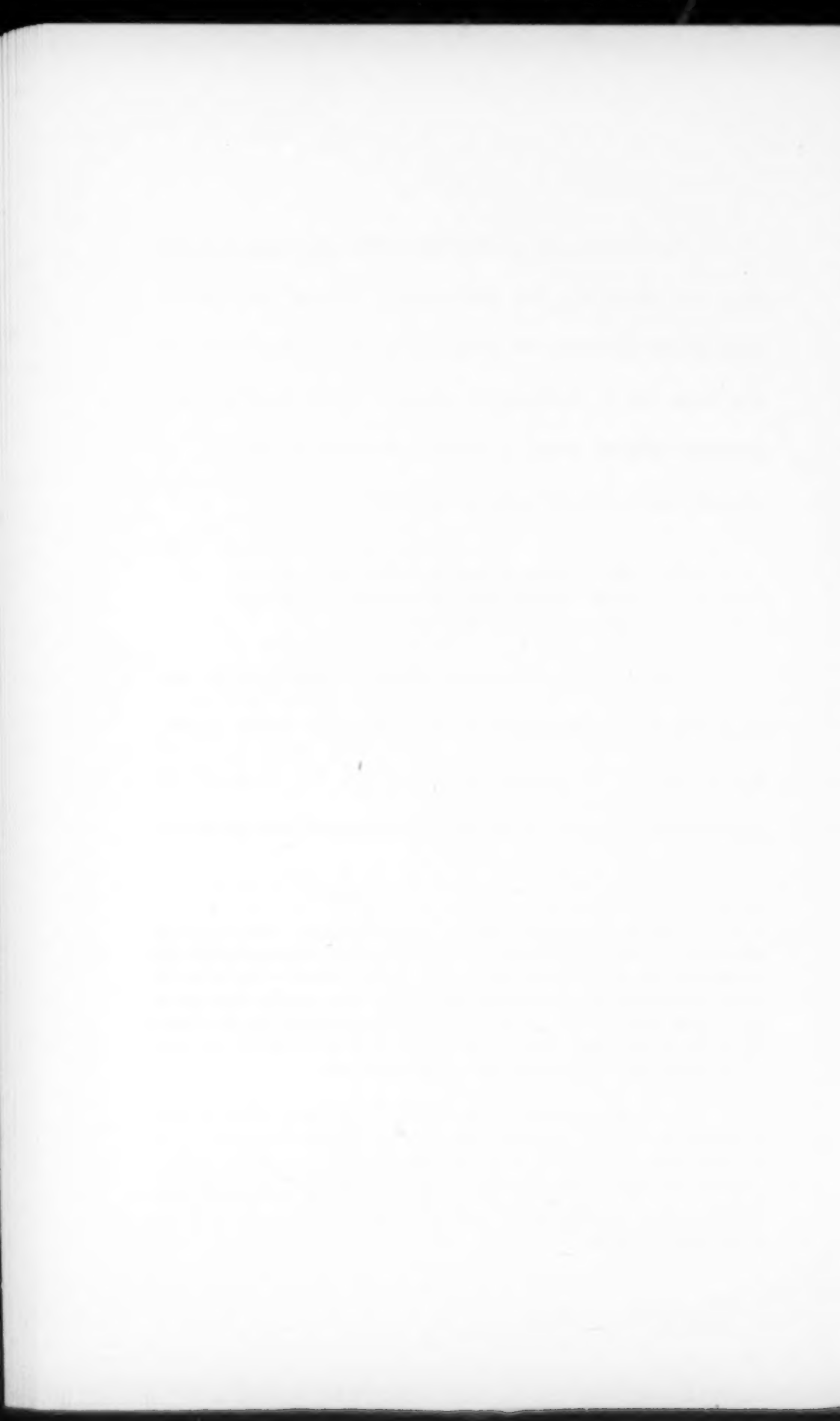
### III. The Decision Below is Not Inconsistent with Federal and Other State Decisions and Merits No Review

The Florida Supreme Court's decision is not inconsistent with decisions of other courts on similar issues, and presents no special occasion for the exercise of discretionary review. The Department's assertions about the

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<sup>6</sup>The Petition argues that the Florida Supreme Court's decision determining liability is final for review purposes, contrary to Grays Harbor Co. v. Coats-Fordney Co., 243 U.S. 251 (1917). Modern decisions construing the finality requirement have preserved the Grays Harbor rule. See Cox Broadcasting Co. v. Cohn, 420 U.S. 469, n.6 at 477-78 (1975); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633 (1981). Adherence to precedent would require that certiorari be denied on this basis as well.

The Department's discussion of the finality issue relies on Cox Broadcasting. Unlike Cox Broadcasting, however, this case does not involve a potential future trial that might foreclose important federal issues from review. That trial has already taken place here, and the only appellate review available now is on state law grounds that governed the final judgment of the trial court. If a dispositive federal issue had existed, the opportunity to present it for review in this Court has passed.





novelty, importance and inconsistency of this decision are based entirely on mischaracterizations of the issues presented. It is necessary at this point to clarify and supplement the Department's discussion of the factual background.

The Department's diagnosis of citrus disease at Ward's Nursery in August 1984 was based on inadequate information and false assumptions about the nature of the disease found. The disease found was not the virulent "A" strain canker originally suspected, but a mild strain called "nursery" or "E" strain canker that posed no threat to the citrus industry. The undisputed expert testimony at the trial on liability established this fact. The Department's witnesses acknowledged that they did not know what disease had been found. They simply assumed that it was the virulent "A" strain.<sup>7</sup>

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<sup>7</sup>The United States Department of Agriculture recently confirmed that the "nursery" strain found at Ward's Nursery posed no danger to the industry. The report found:

There is insufficient evidence to support the contention that even the most virulent strains (also referred to as aggressive strains), are a serious threat to citrus production in Florida.



The Department followed its assumption that the disease was dangerous with a unilateral declaration of emergency and peremptory destruction of citrus trees. The Department rejected less drastic alternatives, such as quarantine and spraying. Under Florida law, the owners of the condemned property had no opportunity to contest the factual basis for the emergency administrative "Immediate Final Orders," or to establish the healthiness of the condemned trees until this inverse condemnation proceeding.<sup>8</sup>

Respondents' trees were never infected or infested with, or even exposed to, citrus canker of any kind, not even the "nursery" strain found at Ward's Nursery. They were

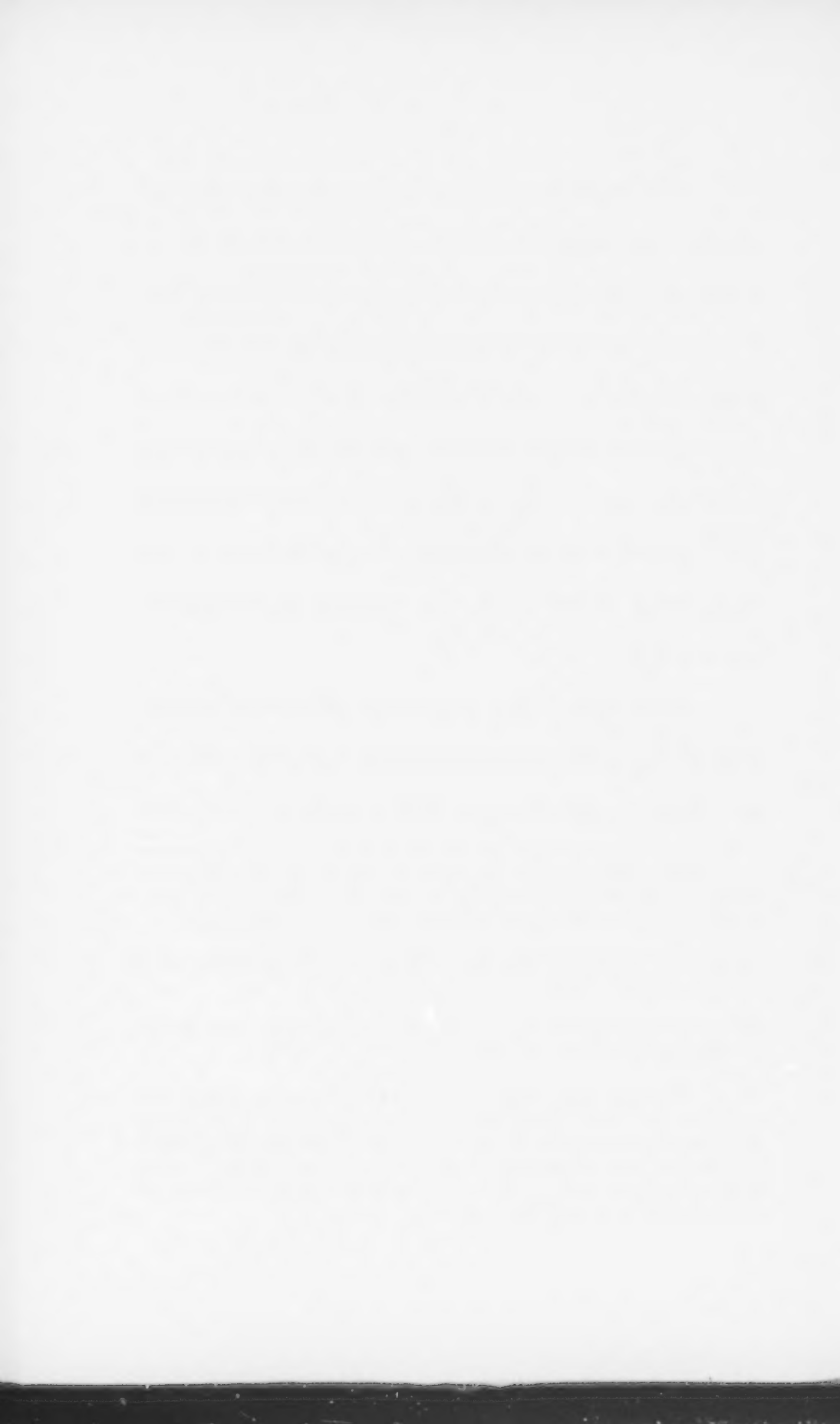
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No positive evidence exists to suggest that the *Xanthomonas* nursery strains pose a threat of significant losses or reduction in quality to bearing citrus in groves. Thus, it is not clear to us that any control will be required.

Report of the Scientific Review Panel -- Citrus Canker Nurser Strains at 2, 3 (U.S.D.A., May 11, 1988).

The report found that even the "A" or "Asiatic" strain can be controlled by spraying, cultural practices, and sanitation. *Id.* at 4.

<sup>8</sup>See *State Plant Board v. Smith*, above, and *Conner v. Carlton*, 223 So.2d 324 (Fla. 1969). In the instant case, the Department began burning Respondents' citrus plants on October 7, 1984, and did not issue its "Immediate Final Orders" until the burning was nearly complete, on October 16, 1984. Petition Appendix A 44-51. The orders make no findings concerning the incidence of canker at Respondents' nurseries.



healthy and valuable plants posing no threat to other plants.

The Department burned Respondents' plants pursuant to the eradication program only because they had purchased budwood from Ward's Nursery some four months before any infection there. The Courts below did not find that the burning was a disease control measure to protect public health and safety, but rather that it was perceived necessary to promote or protect the industry's economic interests.<sup>9</sup> The trial court held that "A police power circumstance existed to protect the economic public welfare. . . ." Petition Appendix A-17. The Second District Court of Appeal quoted this finding with approval, and held that:

Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefited the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery.

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<sup>9</sup> The state courts have upheld police power measures undertaken to promote the economic interests of the state citrus industry. See Coca-Cola v. State Dept. of Citrus, 406 So.2d 1079 (Fla. 1982), app. dismissed sub nom Kraft Inc. v. Florida Dept. of Citrus, 456 U.S. 1002 (1982). That was the purpose of the eradication program as applied in this case.



## Petition Appendix A-16.

The Florida Supreme Court also upheld the trial court's findings, and quoted this conclusion of the District Court of Appeal with approval. Petition Appendix A-3, A-6.

The authorities cited by the Department for conflict do not concern the destruction of healthy plants for economic benefit to the industry. Once that factual situation is understood, the alleged inconsistencies vanish.

The Florida Supreme Court's reasoning is not inconsistent with that used by this Court in taking cases. First, it considered the nature of the Department's action, especially the physical invasion of the property. A physical invasion deprives the owner of all use and benefit of the property, and impairs the ability to dispose of the property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 417 (1982). The physical destruction of personal property has the same effect as the physical invasion of real property.

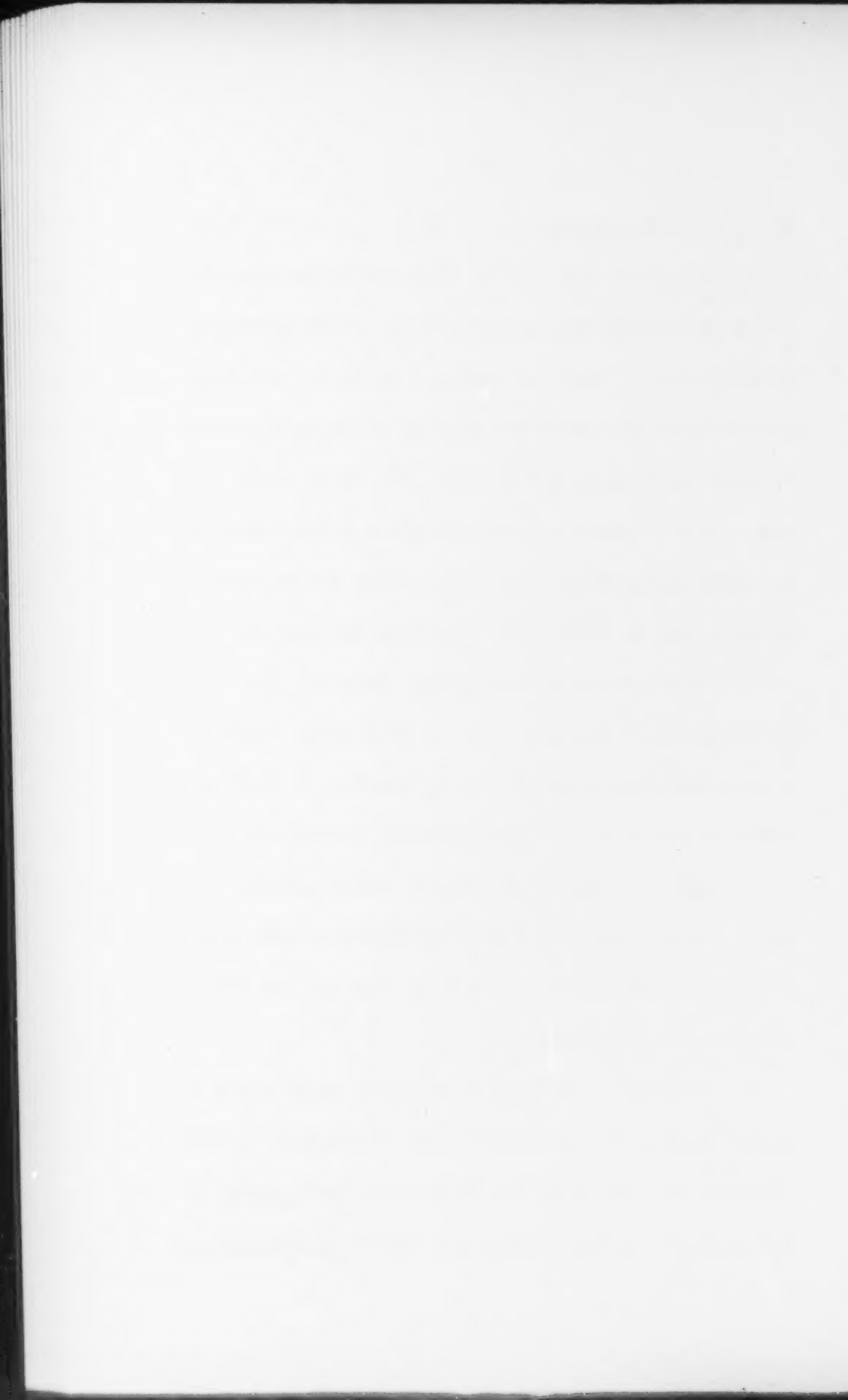
A second factor is the governmental purpose or justification for implementing the regulation in question. This factor was emphasized in Keystone Bituminous Coal





Ass'n v. DeBenedictus, \_\_\_\_\_ U.S. \_\_\_\_\_, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). There is no question that where government takes property that is inherently harmful or dangerous -- such as diseased plants or livestock, adulterated drugs, contraband weapons or mining rights that by their exercise would endanger the community -- it addresses a nuisance and prevents grave public harm. In Keystone Bituminous Coal Ass'n, there was no serious question that the prohibitive regulation was necessary to prevent land subsidence and related dangers. There no compensation is required. On the other hand, when the government takes property that is harmless in itself and poses no public danger, compensation is required. The instant case, involving the burning of healthy and harmless citrus plants to maintain public confidence in state citrus products, clearly falls in the latter category for which compensation is required.

The third factor cited by this Court is the extent to which regulation interferes with investment-backed expectations. This factor was discussed in both Loretto and Keystone Bituminous Coal Ass'n. Keystone Bituminous



Coal Ass'n concerned a prohibitive regulation that, on the record presented, did not significantly diminish property value or profitable operations thereon. Id., 94 L.Ed.2d at 488, 493. This case concerns a confiscation that destroyed the entire value of the property. Here the nursery owners had every right to expect that their investments would bear fruit. The Department's total destruction of the healthy trees clearly interfered with Respondents' legitimate investment-backed expectations, and justified an award of compensation. The award of compensation would be due under either federal or state constitutional law.

Miller v. Schoene, 276 U.S. 272 (1927), is the only decision from this Court cited by Petitioner that concerns taking of plants. In Miller, this Court held no compensation was required under the United States Constitution when the state felled cedar trees infected with a fungus dangerous to apple trees. Miller is inapplicable for several reasons. First, the cedar trees were felled, not burned as in this case, so their entire value was not destroyed. This distinction was recognized in Keystone Bituminous Coal Ass'n, above, 94 L.Ed.2d at 506 (dissent of four justices). Second, the cedar



trees were actually infected and dangerous, whereas the citrus plants here were healthy and harmless. Third, the cedar wood had little economic value compared to the apple trees that were saved, so the owner's investment-backed expectations were not substantially impaired. In the instant case, the healthy citrus stock had substantial value, and was destroyed only to prevent perceived danger to other citrus stock. Miller is distinguishable from this case on each of the three Loretto-Keystone tests.

Finally, the Department cites two lower federal court decisions and numerous decisions of other state courts that it claims conflict with the instant decision. These decisions fall into two categories. There are decisions that authorize destruction of diseased or dangerous plants or livestock -- a situation not applicable here. There are also decisions that uphold quarantines of suspect plants, where full value is not destroyed. Florida law recognizes that such reasonable quarantines do not constitute takings. See Flake v. State, 383 So.2d 285 (Fla 5th DCA 1980). Had the cases cited by the Department considered destruction of healthy crops, they could reasonably have reached a different result. See, e.g.,



Colvill v. Fox, 149 P. 496, 499 (Mont.1915) (if owner's apples destroyed by state fruit pest inspector were not affected with apple scab, his right to recover "could not be questioned.")

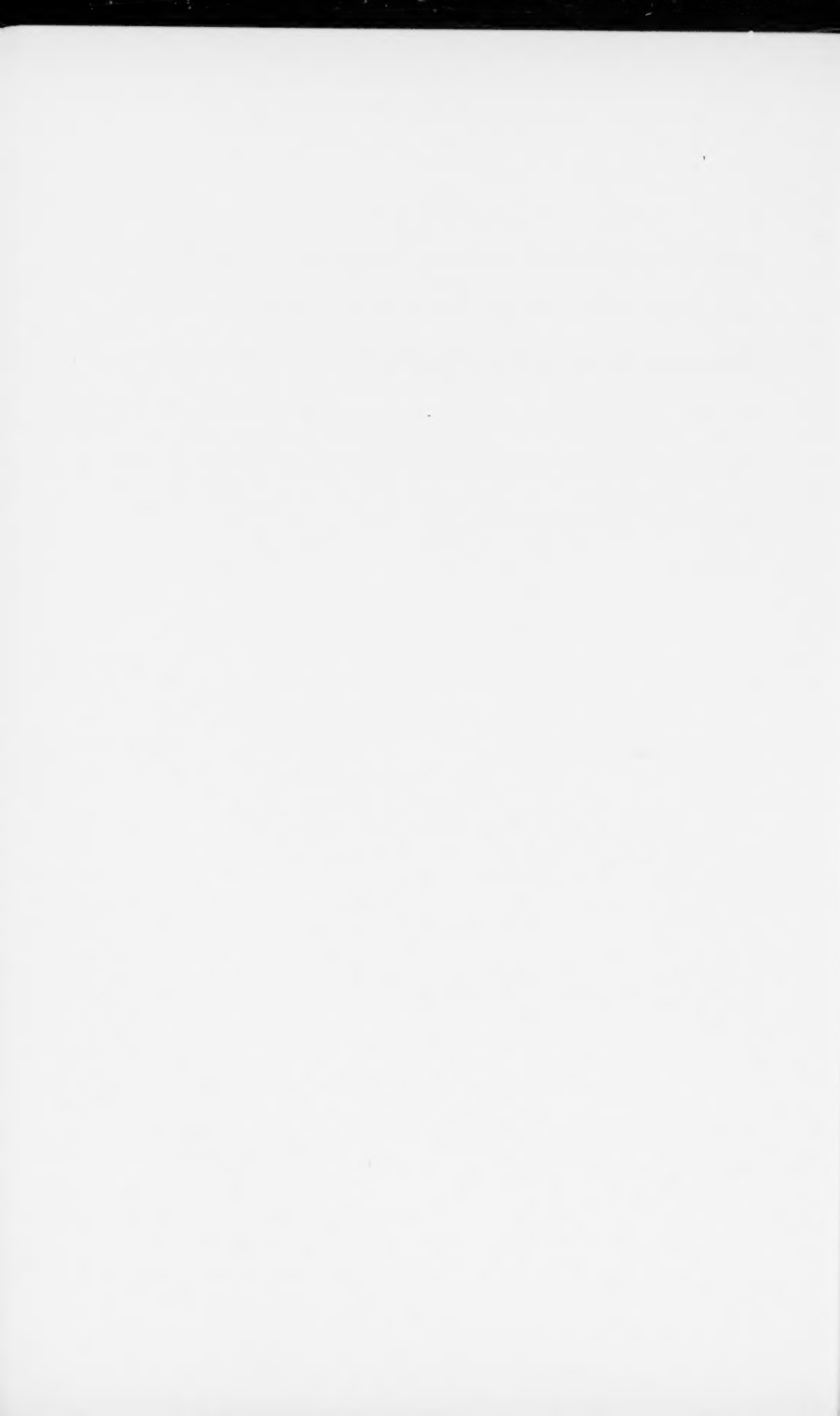
The determination of whether a police power exercise results in a taking involves an ad hoc factual inquiry. Loretto, above at 426. The District Court of Appeal cited this principle once, Petition Appendix A-12, and the Florida Supreme Court cited it twice. Petition Appendix A-2, A-5. The decision is clearly not an unruly precedent impairing a wide range of state police powers, as the Department contends, but is expressly limited to the unique factual record carefully summarized in the opinions. In short, the decision furnishes no basis for generalized concern among state regulatory authorities.

The key point is that the Department inflicted irreversible damage on healthy and harmless citrus stock, destroying all use or benefit therein, in order restore public confidence in Florida citrus products, for the benefit of the entire citrus industry. The Florida Supreme Court's decision allows the state to undertake such measures on an emergency





basis where perceived necessary, but spreads the burden of loss to the whole economy where such measures overshoot their mark by destroying valuable property that poses no danger. This is a fair, sensible and standard application of the compensation requirement. Nothing in the decision merits this Court's review.



**CONCLUSION**

Respondents pray that the Court will deny the petition for writ of certiorari.

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(Counsel of Record)  
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**A-i**  
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A-1

IN THE CIRCUIT COURT OF  
TENTH JUDICIAL CIRCUIT  
IN AND FOR HARDEE COUNTY  
FLORIDA

MID-FLORIDA GROWERS, INC., and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composed of Joe Himrod  
and Joe B. Himrod,

Plaintiffs,

vs.

CASE NO. G-85-275

STATE OF FLORIDA, DEPARTMENT OF  
AGRICULTURE AND CONSUMER SERVICES,

Defendants.

---

SECOND AMENDED COMPLAINT

Plaintiffs, Mid-Florida Growers, Inc. ("Mid-Florida") and  
Himrod & Himrod Citrus Nursery ("Himrod & Himrod"),  
sue the State of Florida, Department of Agriculture and  
Consumer Services ("Department"), an agency of the State  
of Florida, and allege:

1. This is an action for money damages exceeding  
\$5,000.00 for unconstitutional taking of Plaintiffs'  
property without just compensation.





A-2

2. Mid-Florida is a Florida corporation, doing business as a nursery located in Hardee County, Florida.

3. Himrod & Himrod Citrus Nursery is a partnership composed of Joe Himrod and Joe B. Himrod, doing business as a nursery located in Hardee County, Florida.

4. The Department is an agency of the State of Florida responsible for enforcing state laws relating to agriculture pursuant to Chapters 570 and 581, Florida Statutes.

5. In April of 1984, Mid-Florida and Himrod & Himrod received citrus budwood from, or propagated from, Ward's Nursery, a citrus nursery located in Polk County, Florida.

6. On August 27, 1984, citrus canker (*Xanthomonas campestris* pv. *citri*) was detected in Ward's Nursery.

7. Citrus canker is a bacterial disease causing damage to leaves, shoots, and fruit of susceptible plants in the Rutaceae (citrus) family.



8. Because the records of Ward's Nursery revealed that Mid-Florida and Himrod & Himrod had obtained budwood from Ward's Nursery, Department inspectors on September 6, 1984, obtained samples of the citrus trees from Mid-Florida and Himrod & Himrod to test whether their trees were infected with the citrus canker.

9. On September 10, 1984, the Department informed that the tests conducted on trees from Mid-Florida and Himrod & Himrod's nurseries were "negative," meaning that their trees were not infested with, or carriers of, citrus canker.

10. Despite this finding, the Department advised Plaintiff on October 2, 1984, that their citrus trees and budwood must be burned and that a quarantine of their nurseries was not an acceptable alternative.

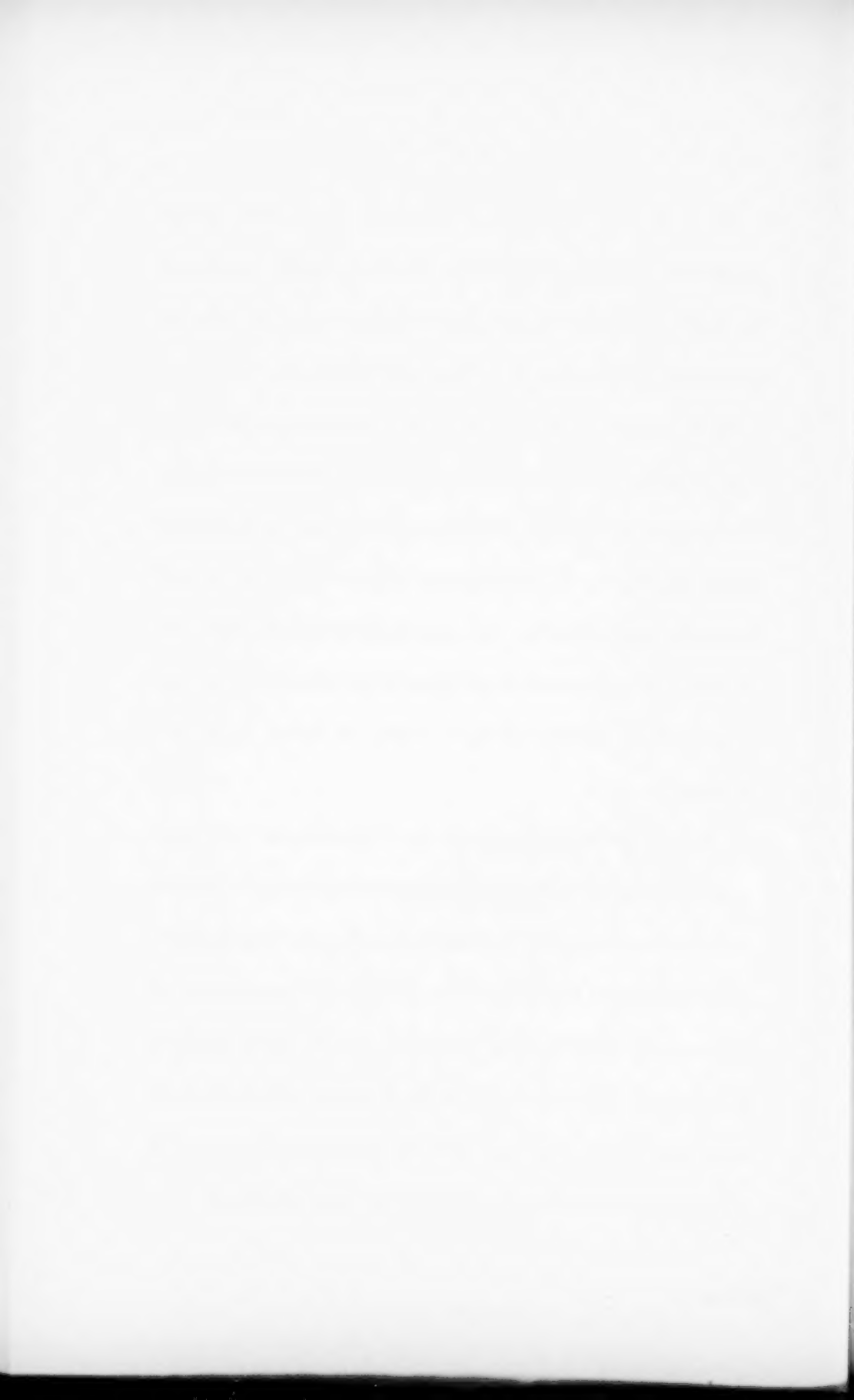
11. The Department advised Plaintiffs, however, that they would be paid full and just compensation for the destruction of their trees, and Plaintiffs thereupon cooperated with the Department in scheduling their trees for burning.



12. From Monday, October 7, 1984, until Wednesday, October 17, 1984, the Department destroyed by burning 137,880 of Mid-Florida's and 143,594 of Himrod & Himrod's citrus trees and budwood.

13. On October 16, 1984, the Department entered a confirmatory order that designated the nurseries of Mid-Florida and Himrod & Himrod as eradication or treatment areas pursuant to Emergency Rules 5BER84-8 and 5BER84-9 and directed that their budwoods received from Ward's Nursery and all their citrus trees within 125 feet be immediately destroyed by burning or other approved method.

14. Despite statements by Department officials, including the Commissioner of Agriculture, that citrus tree owners would be paid full and fair compensation for their destroyed trees, Plaintiffs were paid, under reservation of rights, only 30% to 60% of their actual invested dollars, which was 30% to 40% of the market value of their destroyed trees. This amount was substantially less than full and fair compensation for the property destroyed.



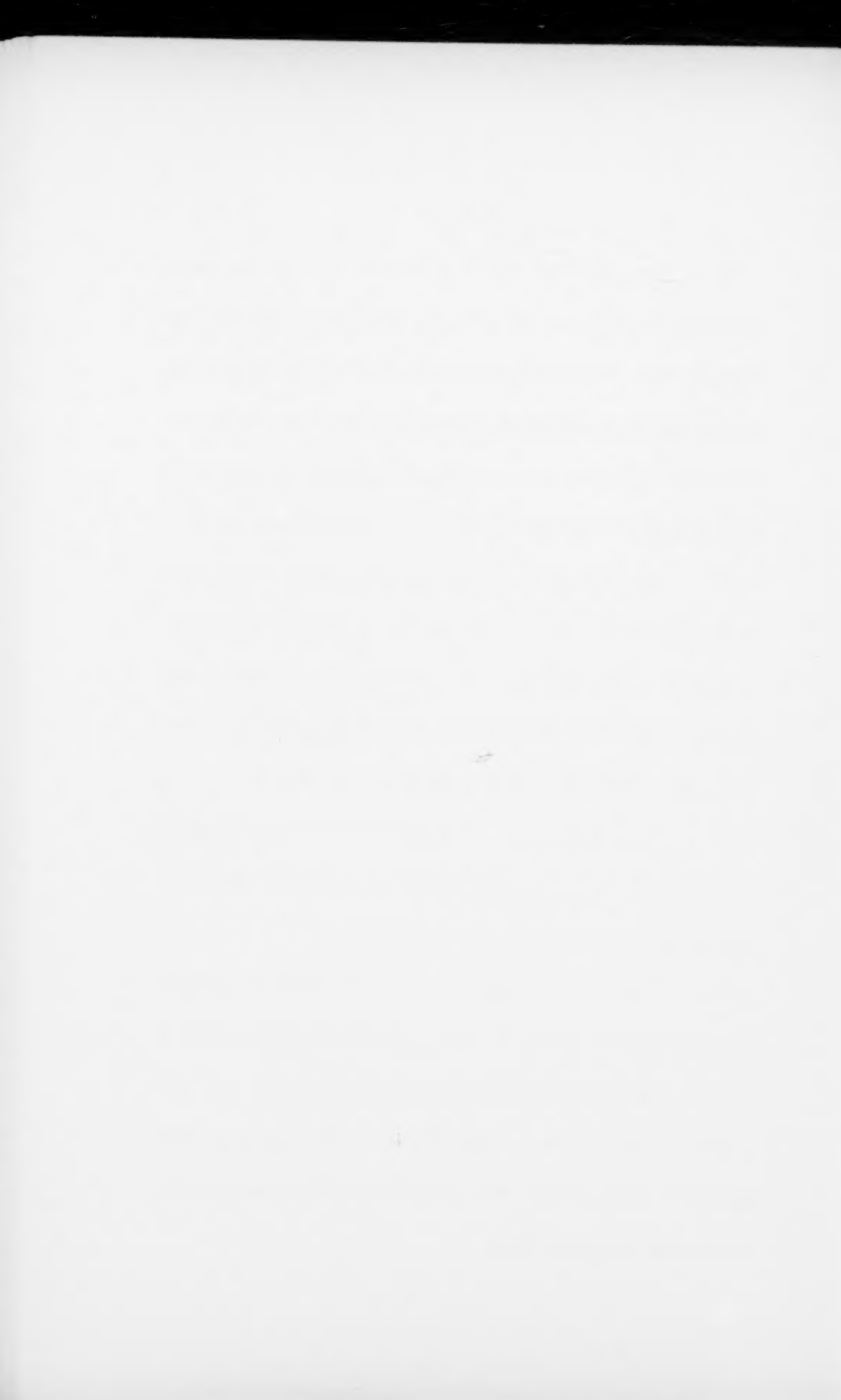
16. Pursuant to its regulatory power to take reasonable measures to protect the citrus industry in Florida as a whole, the Department could order the immediate destruction of Plaintiffs' non-infected citrus trees and budwood because a small number of budwood were bought from a nursery that had some infected stock.

17. Nevertheless, in destroying such trees and budwood that were not infected by, or carriers of, citrus canker or other disease, the Department thereby took Plaintiffs' property for a public use or purpose, and was obligated to pay just compensation to Plaintiffs.

18. The Department inversely condemned Plaintiffs' property by ordering the destruction thereof without paying full and fair compensation.

19. Plaintiffs are entitled to recover damages for the unconstitutional taking of their property in the amount of the uncompensated value thereof, plus interest.

20. Plaintiffs have retained counsel to represent them in these proceedings and are also entitled to recover reasonable attorneys' fees.





Wherefore, Plaintiffs pray for entry of Judgment against Defendant for compensatory damages, attorneys' fees and costs. Plaintiffs demand trial by jury.

Dated this 10th day of October, 1985.

CULPEPPER, PELHAM, TURNER  
& MANNHEIMER  
300 East Park Avenue  
Post Office Drawer 11300  
Tallahassee, Florida 32302  
904/681-6810

By: /s/ M. Stephen Turner  
M. Stephen Turner

And

/s/ William L. Hyde  
William L. Hyde

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Chastain, General Counsel, Florida Department of Agriculture and Consumer Services, Room 515, May Building, Tallahassee, Florida 32301; by U.S. Mail this 10th day of October, 1985.

/s/ M. Stephen Turner



A-7  
IN THE CIRCUIT COURT,  
TENTH JUDICIAL CIRCUIT,  
HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composed of  
Joe Himrod and Joe B. Himrod,

Plaintiffs,

vs.

Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT OF  
AGRICULTURE AND CONSUMER  
SERVICES,

Defendant.

---

ANSWER

Defendant, State of Florida, Department of  
Agriculture and Consumer Services answers the Second  
Amended Complaint and says:

1. Defendant admits the averments contained in  
paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13 and 16.
2. Defendant denies the averments contained in  
paragraphs 11, 17, 18 and 19.
3. Answering paragraph 20, defendant is  
without knowledge as to whether or not plaintiffs have



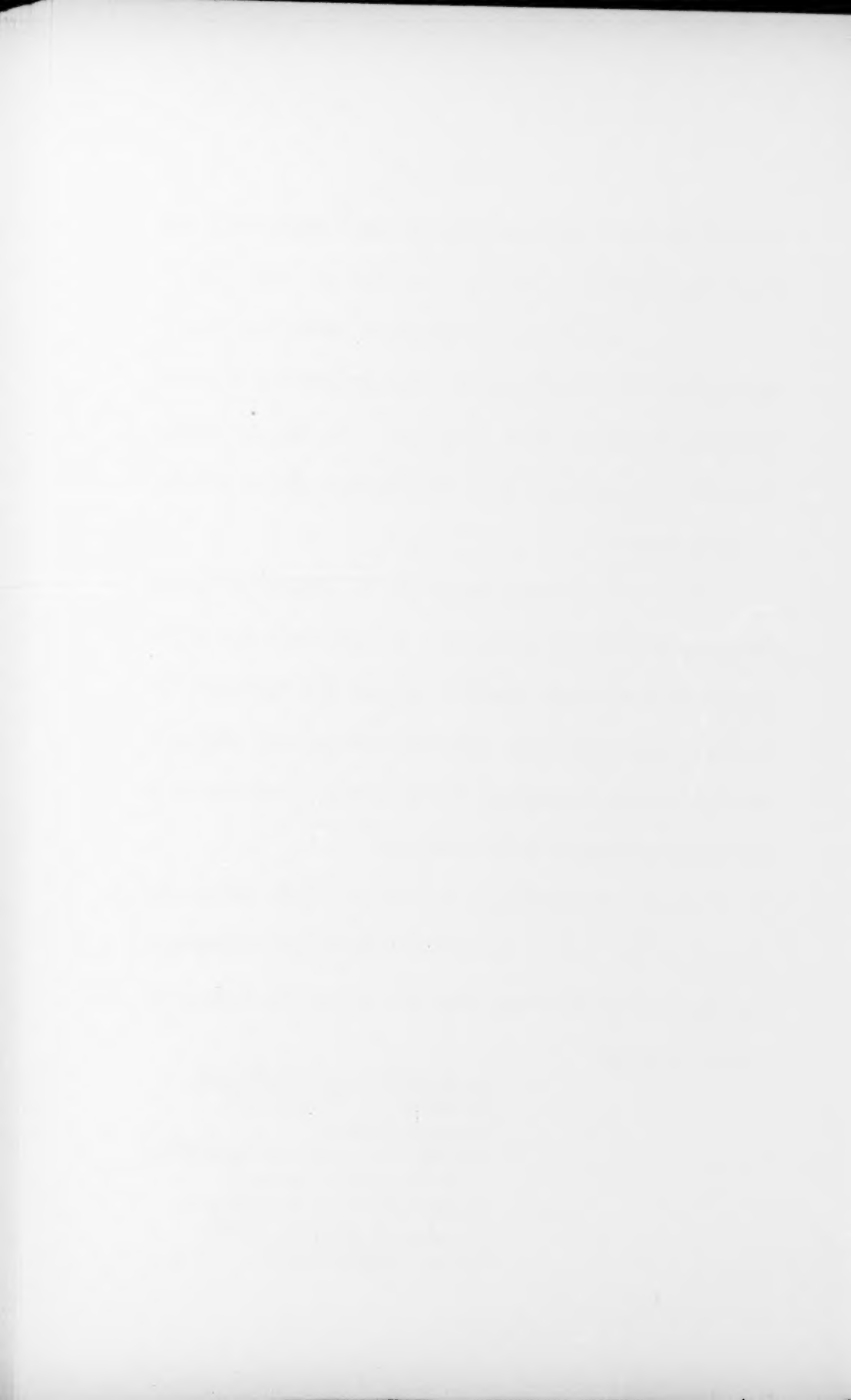
retained counsel to represent them in these proceedings, but denies that plaintiffs are entitled to recover attorneys' fees.

4. Answering paragraph 9, defendant admits that it informed plaintiffs that the tests conducted on the trees from the nurseries were "negative," but denies telling plaintiffs that their trees were not infested with, or carriers of, citrus canker.

5. Answering paragraph 14, defendant denies that its Commissioner or any other officials made statements that citrus tree owners would be full and fair compensation for their destroyed trees. Defendant admits that plaintiffs received financial assistance, but is without knowledge as to the further averments in that paragraph.

6. Defendant is unable to locate within the bounds of the Second Amended Complaint a paragraph number 15, and therefore, does not at this time respond to such a paragraph.

/s/ ROBERT A. CHASTAIN  
ROBERT A. CHASTAIN  
General Counsel  
Florida Department of Agriculture  
and Consumer Services  
Room 515, Mayo Building  
Tallahassee, Florida 32301  
Phone: 904/488-6853



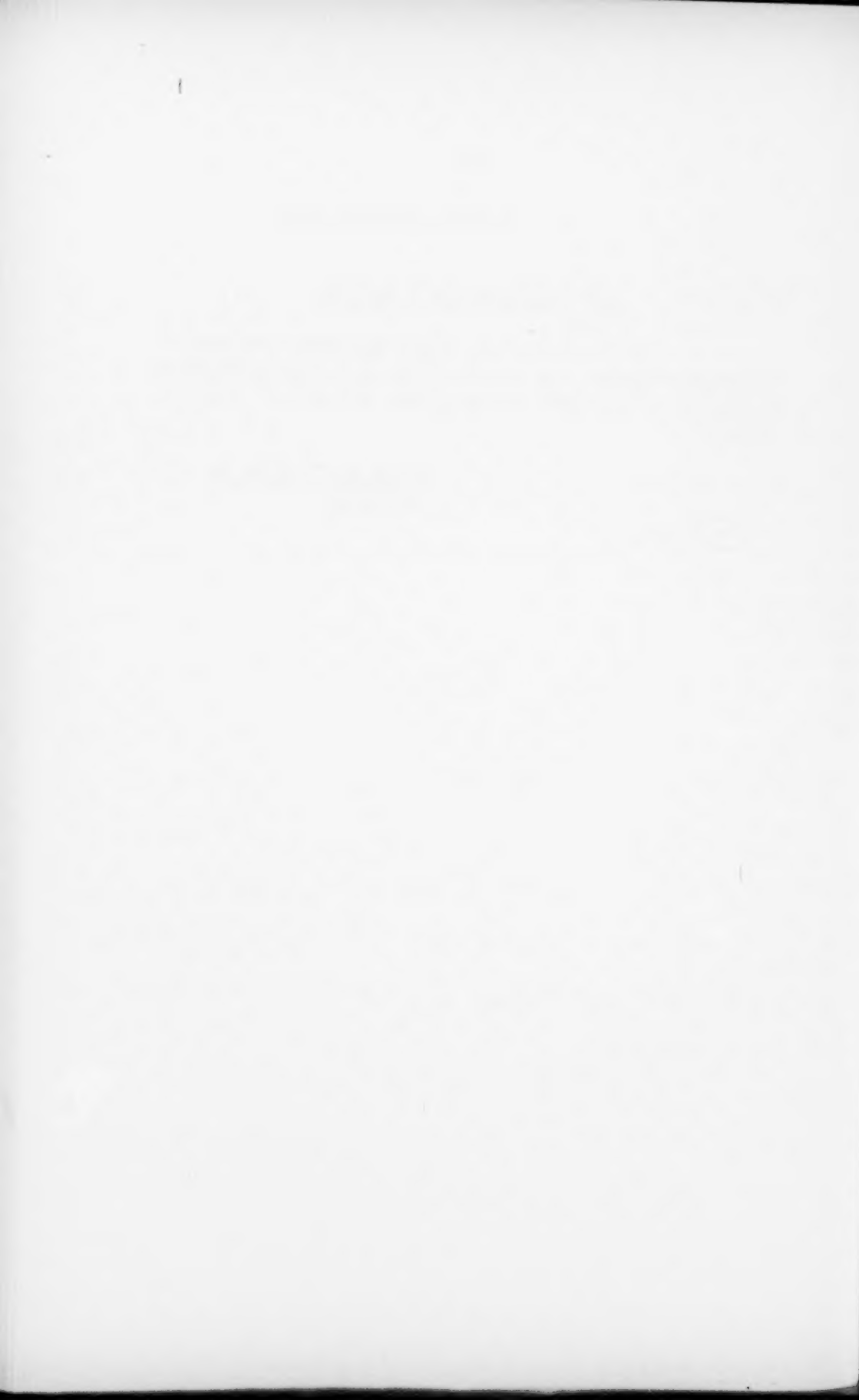
A-9

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to M. Stephen Turner, Esquire and William L. Hyde, Esquire, attorneys for plaintiffs, by mail this 3rd day of January, 1986.

Frank A. Graham, Jr.  
Attorney





A-10

IN THE CIRCUIT COURT FOR THE  
TENTH JUDICIAL CIRCUIT, IN  
AND FOR HARDEE COUNTY,  
FLORIDA

MID-FLORIDA GROWERS, INC., and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composed of Joe  
Himrod and Joe B. Himrod,

Plaintiffs,

vs.

Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURAL AND CONSUMER  
SERVICES,

Defendant.

---

PRETRIAL STIPULATION

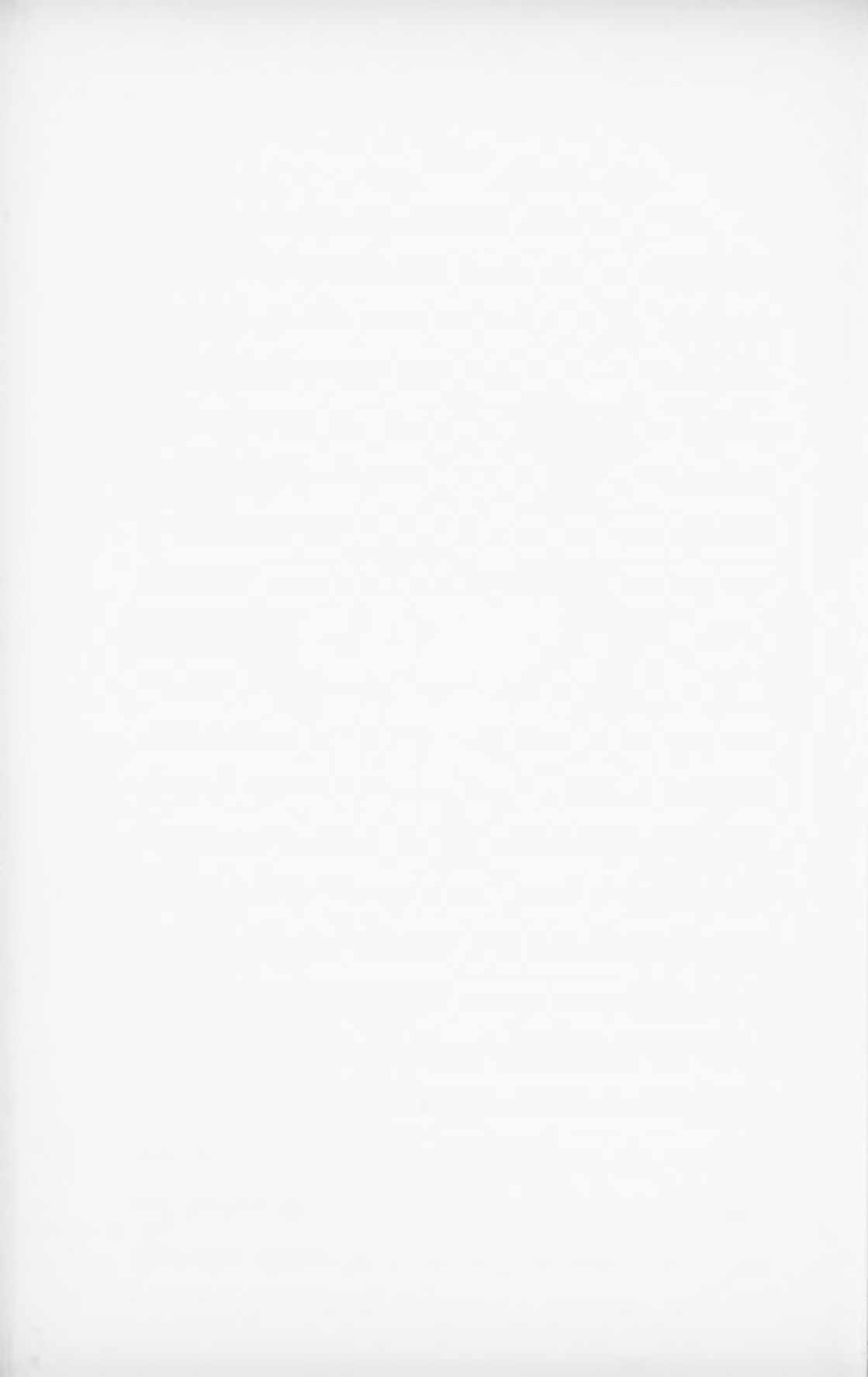
Plaintiffs and Defendants, pursuant to Order for Pretrial Conference dated June 17, 1986, hereby stipulate and agree as follows with regard to the non-jury trial scheduled for September 24, 1986.

(a) Pleadings on which case will go to trial:  
Plaintiffs' Second Amended Complaint dated October 10, 1985 (deemed filed by Order of December 20, 1985), and Defendant's Answer to Second Amended Complaint dated January 3, 1986.



(b) Concise statement of action: Inverse condemnation suit with request for jury trial to determine just compensation if Court finds that taking occurred. Plaintiffs contend that the Defendant State Agency destroyed by burning their nursery stock which was not infected or diseased, thereby resulting in a taking for public purpose. Defendant contends that the destruction occurred pursuant to regulatory and police power and therefore cannot constitute a taking.

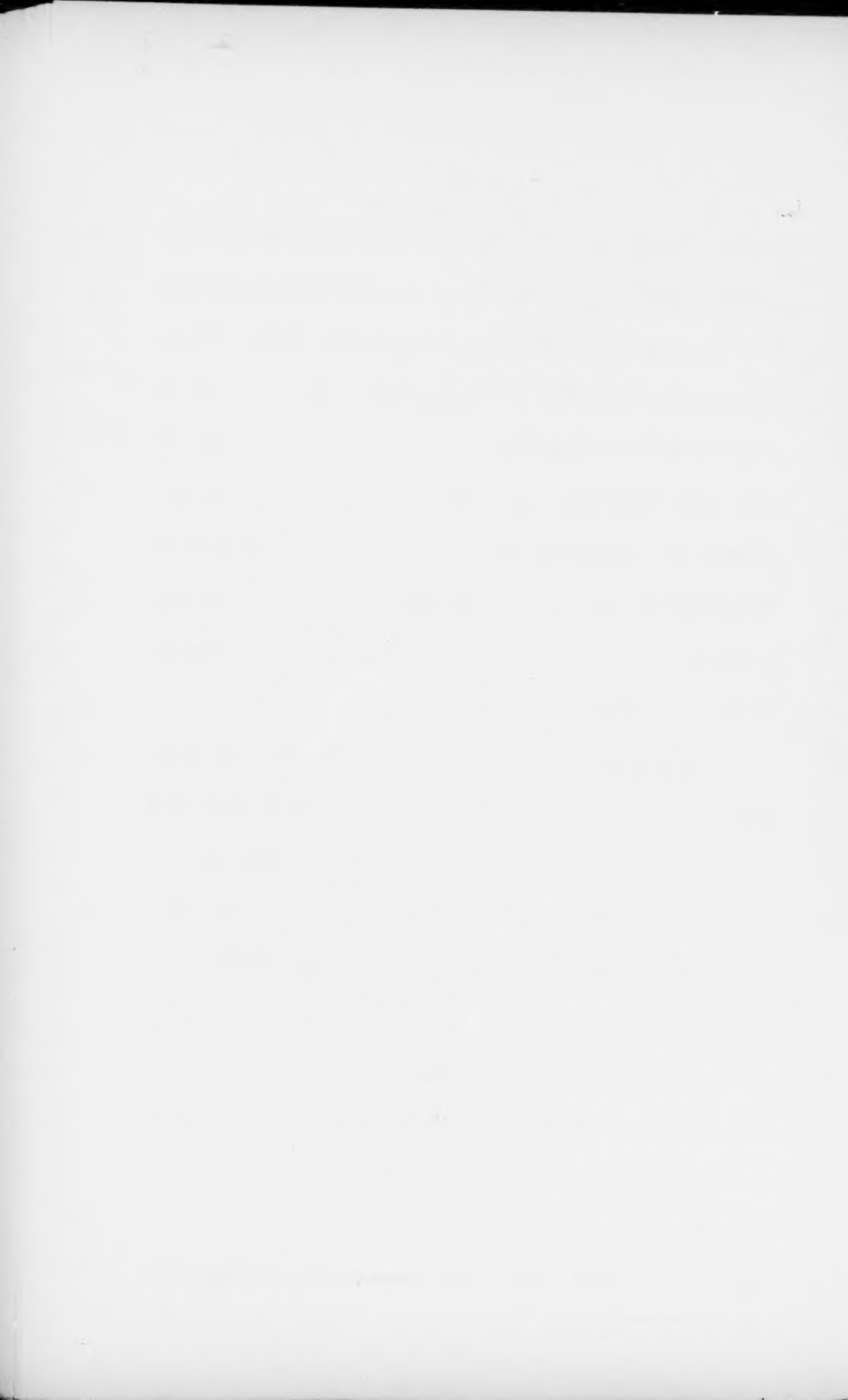
(c) Admitted facts: Action is for damages exceeding \$5,000. Plaintiffs do business in Hardee County. Defendant is charged to enforce state agriculture laws. In April 1984, Plaintiffs received citrus budwood from Ward's Nursery in Polk County. On August 27, 1984, a form of citrus canker was detected at Ward's Nursery. Citrus canker is a bacterial disease that can cause damage to certain citrus plants. Defendant obtained samples from Plaintiffs' Nursery on September 6, 1984, to determine whether their stock was infected. On September 10, 1984, Defendant informed Plaintiff the tests were negative, that is, did not establish that any of their stock was infected by or infested with citrus



canker. However, on October 2, 1984, Defendant advised Plaintiffs that their nursery stock must be burned and that quarantine was not an acceptable alternative. From October 7, to October 19, 1984, Defendant burned some 137,880 of Plaintiff Mid-Florida's and 143,594 of Plaintiff Himrod's trees and budwood. On October 16, 1984, Defendant entered a emergency confirmatory order designating Plaintiffs' Nurseries as eradication areas and directing destruction of Plaintiffs' stock within 125 feet of budwoods from Ward's Nursery.

Disputed facts to be litigated: Whether Defendant assured that Plaintiffs would be fully compensated upon cooperation in scheduling their stock for burning, and whether under the circumstances present, the burning was a taking of property for which full and just compensation is due.

(d) Legal issue for court determination: Whether eminent domain power was exercised and just compensation is due in the circumstances of this case, or whether there was a proper exercise of the police power that would not require full compensation. Defendant also contends that Plaintiffs'



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release of liability resolved all claims for compensation. Plaintiffs do not agree this is an issue in the case. All parties stipulate and agree that only liability will be resolved by the Court at the scheduled September 24, 1986 hearing, and that if liability is determined in favor of Plaintiffs, the amount of damages will be heard at a later jury trial.

(e) List of witnesses who may be called at liability trial:

For Plaintiffs:

1. Bill Lambert
2. Joe Himrod
3. Joe B. Himrod
4. Stan Pelham
5. E. L. Civerola
6. Chan Hannon
7. Jim Griffith
8. Richard Gaskella and Dr. Sal Alfieri

(Defendant's representatives as adverse witnesses)

For Defendant:

1. Dr. Calvin Schoulties





(f) List of exhibits to be used at liability trial:

For Plaintiffs:

1. Cassette film of canker and burnings in 1984.
2. Citrus Canker Action Plan for the State of Florida, November 1984, Revised 1985, Revised 1986.
3. Exhibits from Gaskalla deposition.
4. Materials produced and copied from Defendant's files pursuant to notice regarding exposed plants, inventory, and destroyed plants and specimen tests at Plaintiffs' Nurseries.

For Defendant:

1. All Exhibits to original complaint.

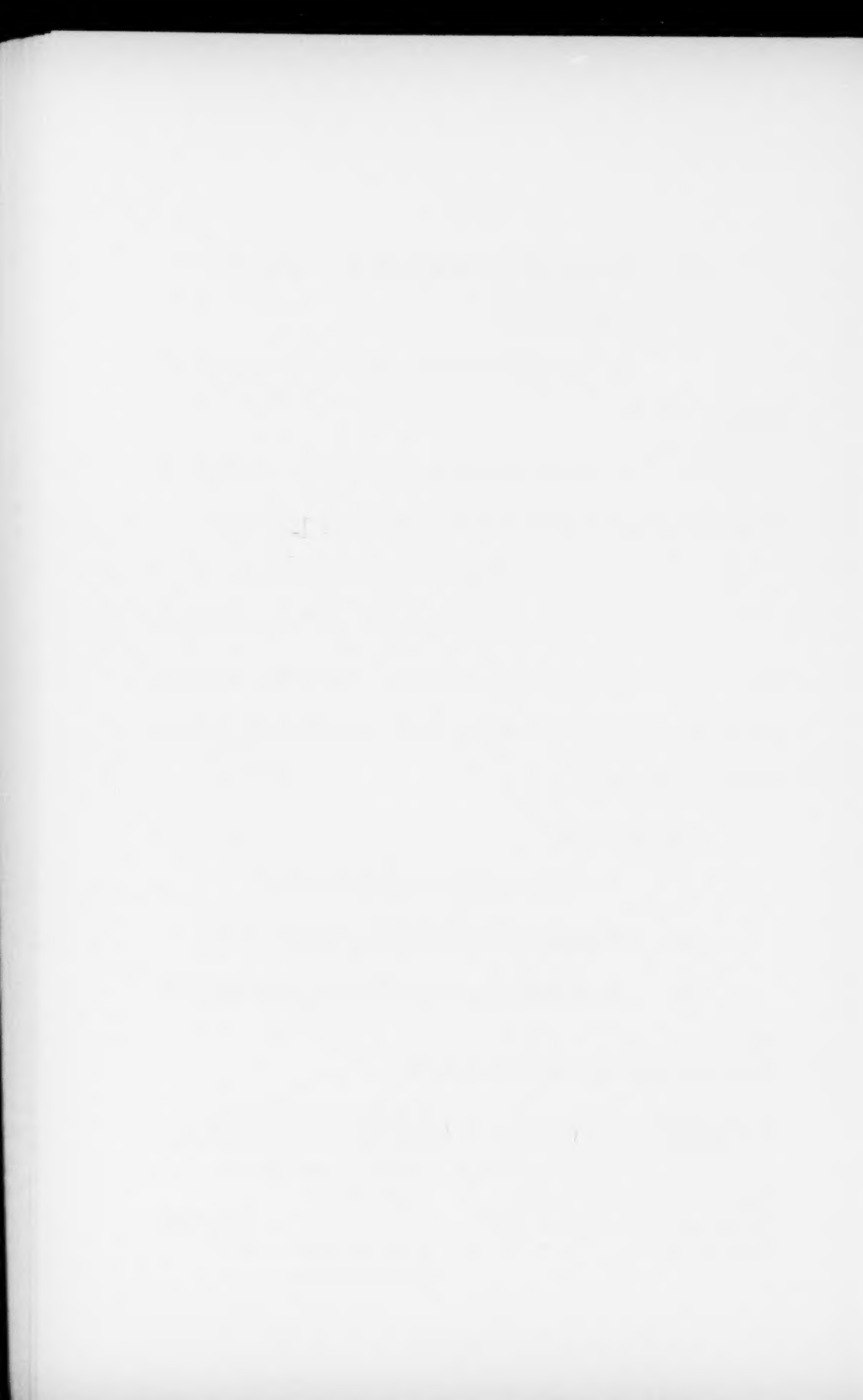
(g) Motions or other pending matters: None.

(h) Signature of counsel for each party appears below.

Dated this 29th day of August, 1986.

/s/ M. Stephen Turner  
CULPEPPER, PELHAM,  
TURNER & MANNHEIMER  
Post Office Drawer 11300  
Tallahassee, FL 32302-3300  
904/681-6810

/s/ Robert A. Chastain  
ROBERT A. CHASTAIN  
Florida Department of  
Agriculture  
Room 515, Mayo Building  
Tallahassee, FL 32301  
904/488-6853



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURE AND CONSUMER  
SERVICES,

Petitioner,

vs.

CASE NO. 70-524

MID-FLORIDA GROWERS, INC. AND  
HIMROD & HIMROD CITRUS NURSERY,  
a partnership composed of  
Joe Himrod and Joe B. Himrod,

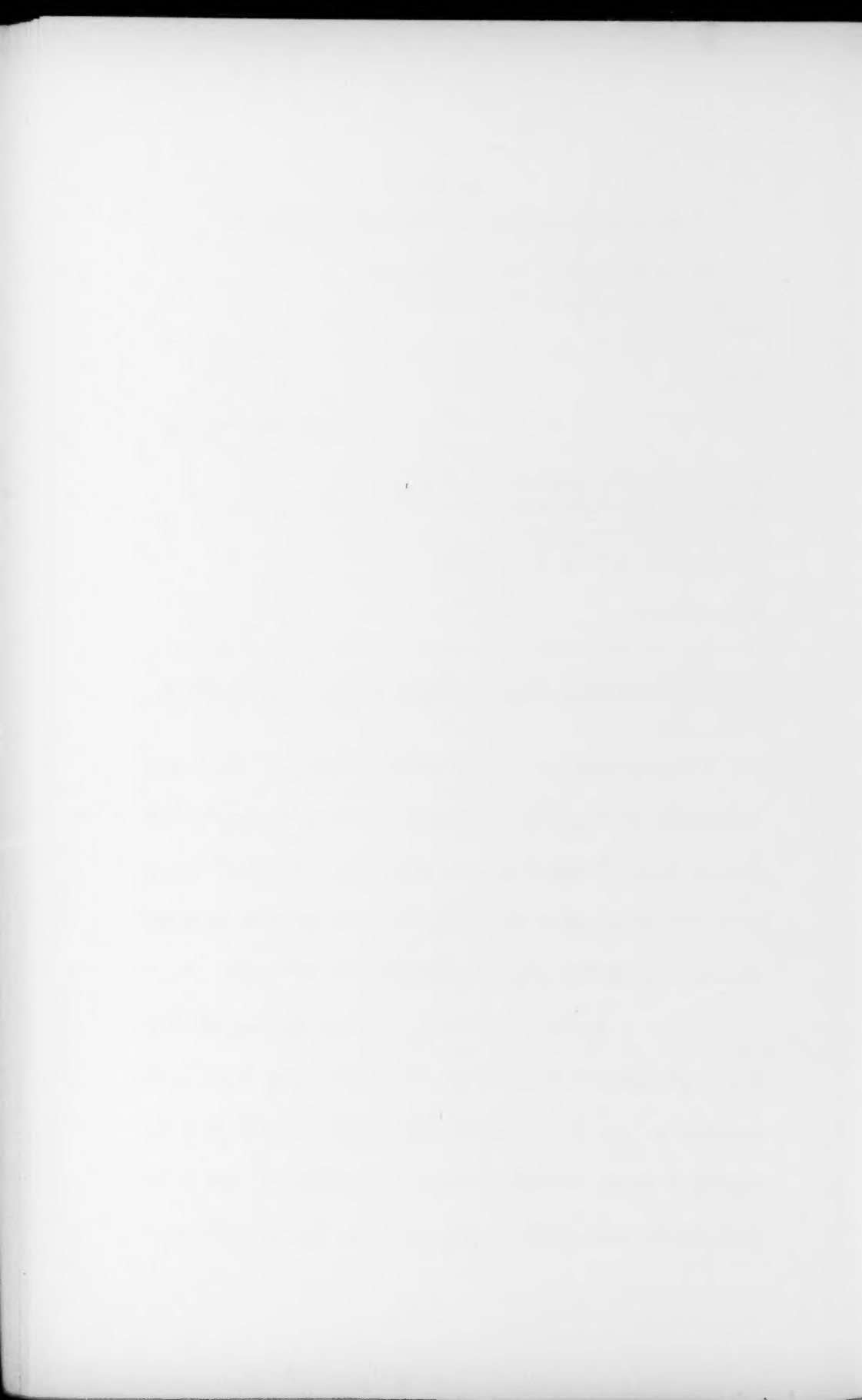
Respondents.

---

RESPONDENT'S MOTION FOR ATTORNEYS' FEES

Respondents, Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery, pursuant to Rule 9.400, Florida Rules of Appellate Procedure, move the Court for an order awarding them attorneys' fees for services in these proceedings, and as grounds in support thereof says:

1. Under §73.131(2), Florida Statutes (1985), in a condemnation proceedings, the condemning authority is required to "pay all reasonable costs of the proceeding in the appellate court, including reasonable attorneys' fees to be assessed by that court, except upon an appeal taken by a



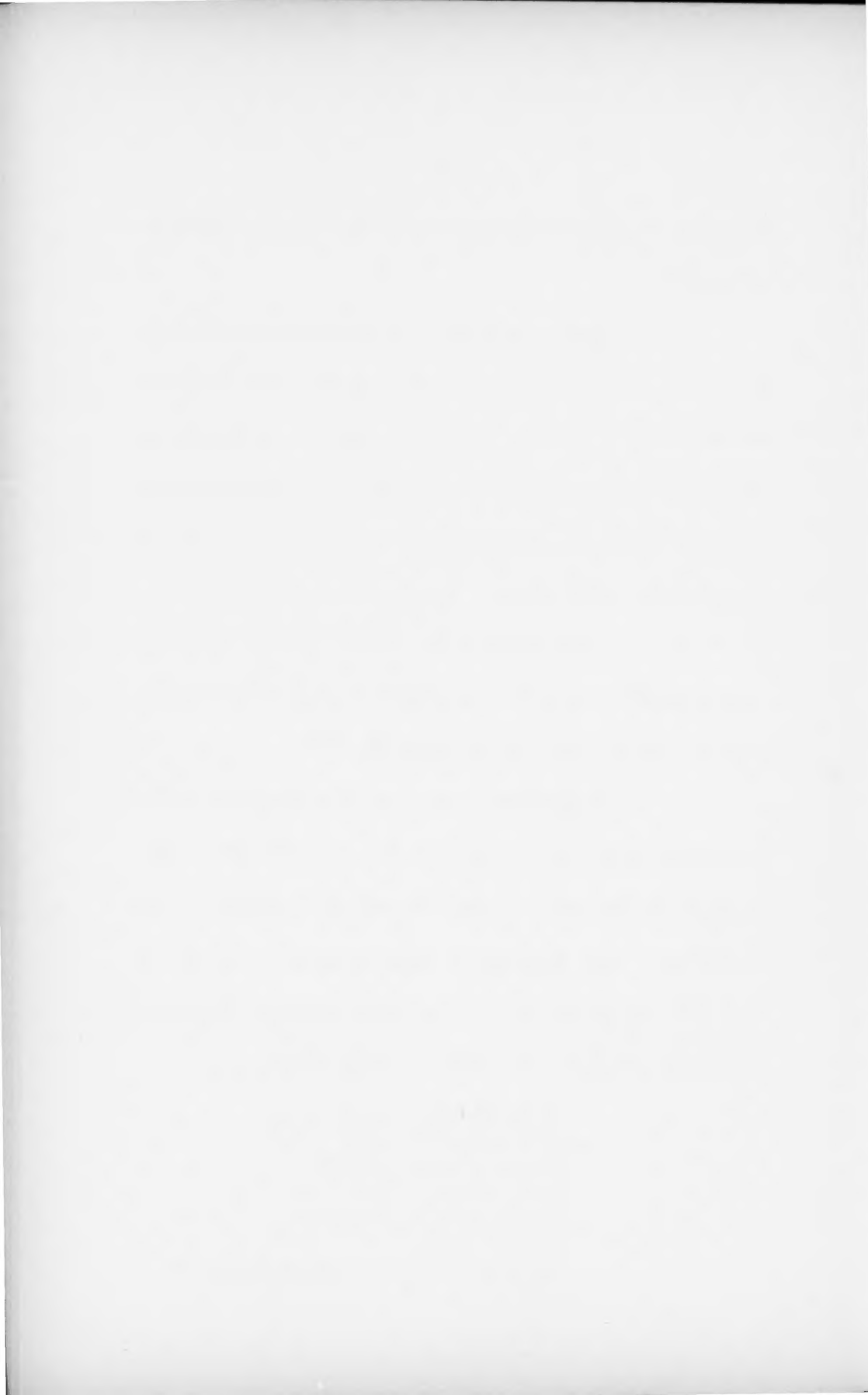
defendant in which that judgment of the trial court shall be affirmed."

2. Respondents have not initiated proceedings in this court, but have been obliged to protect the decisions below finding Petitioner obligated to pay just compensation for inversely condemning their property. Respondents are therefore entitled to attorneys' fees which should be granted to a property owner except when he unsuccessfully appeals.

3. The appellate court below granted Respondents' Motion for Attorneys' Fees as shown by the attached copy of the Order of April 10, 1987.

4. Suggestion is made to allow the trial court to determine reasonable attorneys' fees for services in this Court when fees and costs for trial and DCA proceedings are determined. See Boynton v. Canal Authority, 311 So.2d 412 (Fla. 1st DCA 1975); State Road Dept. of Florida v. Hancock, 250 So.2d 307 (Fla. 2nd DCA 1971).

/s/ M. Stephen Turner  
M. Stephen Turner of  
BROAD AND CASSEL  
P. O. Drawer 11300  
Tallahassee, FL 32302  
904/681-6810  
ATTORNEYS FOR RESPONDENTS



A-17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to FRANK G. GRAHAM, JR., Florida Department of Agriculture, Room 515, Mayo Building, Tallahassee, FL 32301, by U.S. Mail, this 29th day of June, 1987.

/s/ M. Stephen Turner  
M. Stephen Turner





**A-18**  
**IN THE SECOND DISTRICT COURT OF APPEAL**  
**LAKELAND, FLORIDA**

**APRIL 10, 1987**

**STATE, DEPARTMENT OF  
AGRICULTURE AND CONSUMER  
SERVICES,**

**Appellant,**

**v.**

**Case No. 86-2785**

**MID-FLORIDA GROWERS, INC.,  
et al.,**

**Appellees.**

The attorney for Appellees having filed a motion for attorneys fees in the above-styled appeal, upon consideration, it is,

Ordered that said motion is hereby granted in an amount to be set by the trial court.

**A TRUE COPY  
ATTEST:**

**CLERK, DISTRICT COURT OF APPEAL  
SECOND DISTRICT**

**C:  
M. Stephen Turner, Esq.  
Harry L. Michaels, Esq.  
Hon. Coleman W. Best**



**A-19**

**IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL  
CIRCUIT  
IN AND FOR HARDEE COUNTY, FLORIDA**

**MID-FLORIDA GROWERS, INC., and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composd of  
Joe Himrod and Joe B. Himrod,**

**Plaintiffs,**

**vs.**

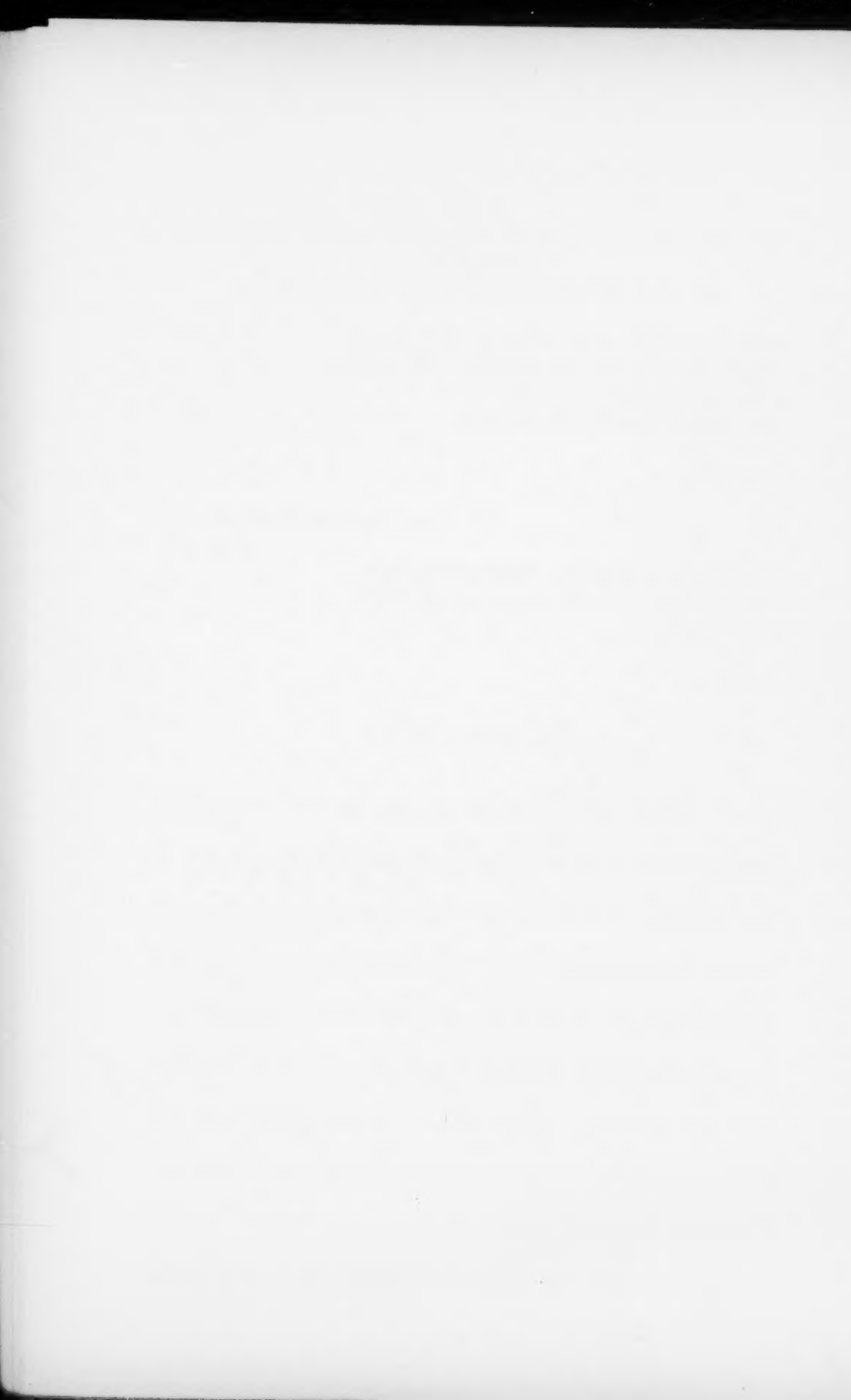
**Case Number CA-G-85-275**

**STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURE AND CONSUMER  
SERVICES,**

**Defendant.**

**PRETRIAL ORDER**

THIS CAUSE came on for pretrial hearing in Chambers on March 2, 1988. M. Stephen Turner, C. A. Boswell, Jr., Dabney L. Conner were present with their clients, William Lambert of Mid-Florida Growers, Inc., Joe Himrod and Joe Himrod, Jr., of Himrod and Himrod Citrus Nursery, Plaintiffs, Mygnon Evans, of counsel to Plaintiffs was also present. Harry Michaels was present for the Defendant, State of Florida, Department of Agriculture and Consumer Services. The Court having reviewed Plaintiffs' Unilateral Pretrial Submission on Damages and received the



argument of counsel and otherwise being advised of the premises, it is hereby ordered:

1. Defendant's ore tenus motion to stay trial proceedings pending possible review of the determination of liability of Defendant for damages on re-hearing in the Supreme Court of Florida or before the United States Supreme Court is hereby denied because this Court has not received notice of any stay of proceedings or recall of the mandate of the Second District Court of Appeal.

2. Defendant's ore tenus motion to continue the trial now set in this cause on March 22, 1988, for sixty (60) days is hereby denied.

3. Plaintiffs' Unilateral Pretrial Submission on Damages is adopted as the Pretrial Stipulation in this cause and is incorporated by this order because the Defendant has chosen not to participate in the preparation of a Pretrial Stipulation as required by the Court's order setting trial and pretrial conference.

4. Plaintiffs' pending Motions for Leave to Amend the Second Amended Complaint to seek additional compensation for loss of productivity of their business for a



temporary period and for additional unnecessary expenses and relocation costs is hereby granted. These claims are considered part of the matters that may be submitted for determination by the jury on the issue of Plaintiff's damages.

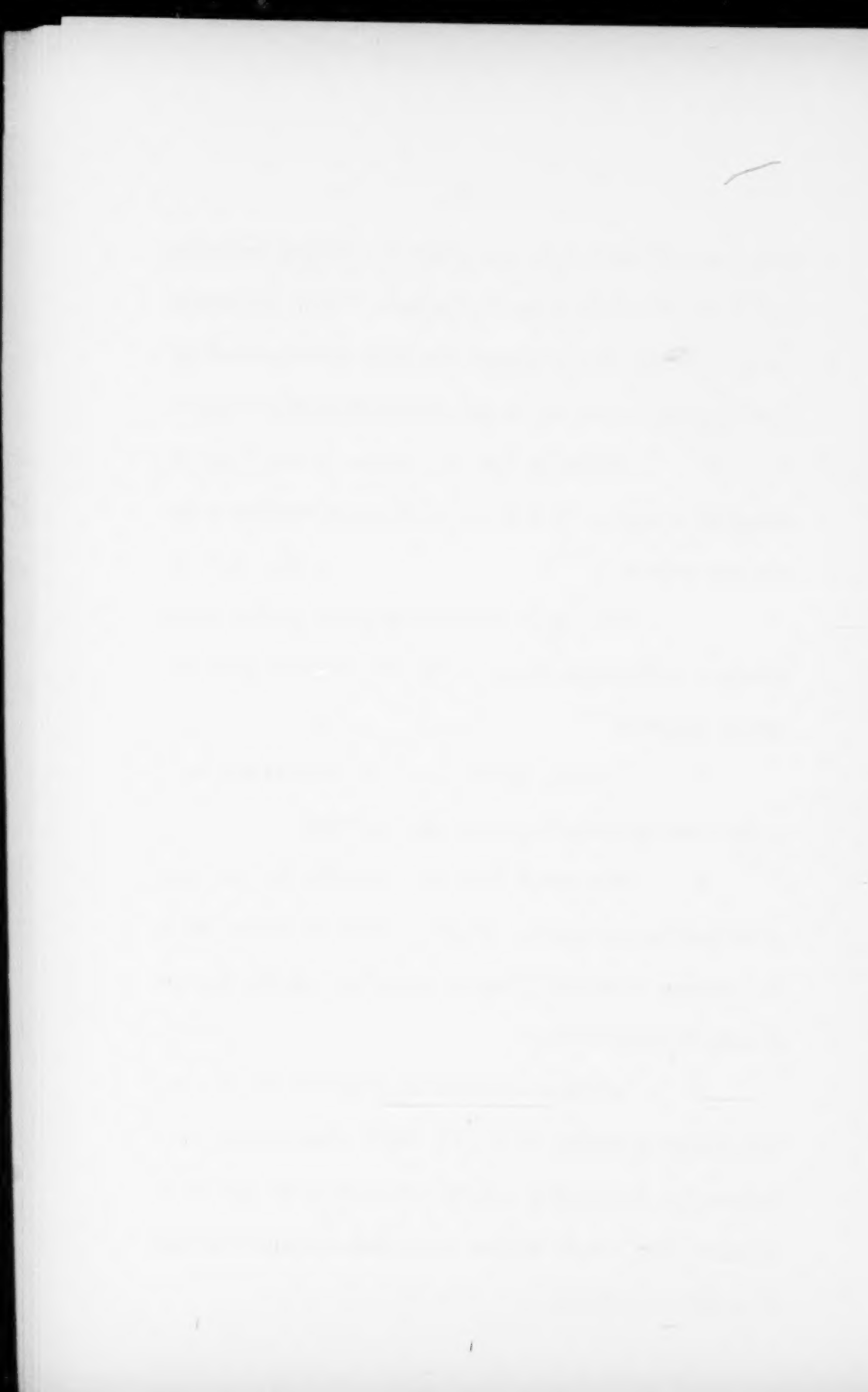
5. Defendant has undertaken to and shall be obligated to acquire the attendance of a court reporter at the trial proceedings.

6. The parties shall exchange all exhibits to be offered into evidence at trial within ten (10) days from the date of this order.

7. Counsel will meet with the Clerk at 8:30 a.m. on the morning of the trial to pre-mark exhibits.

8. The parties shall specify within ten (10) days of the pretrial conference all witnesses they intend to use at trial bearing in mind the Court's admonition against the use of cumulative testimony.

9. All discovery shall be concluded by the close of business on Friday, March 18, 1988. If any person is to appear by deposition, counsel intending to use such deposition(s) shall inform opposing counsel by the discovery cut off date.





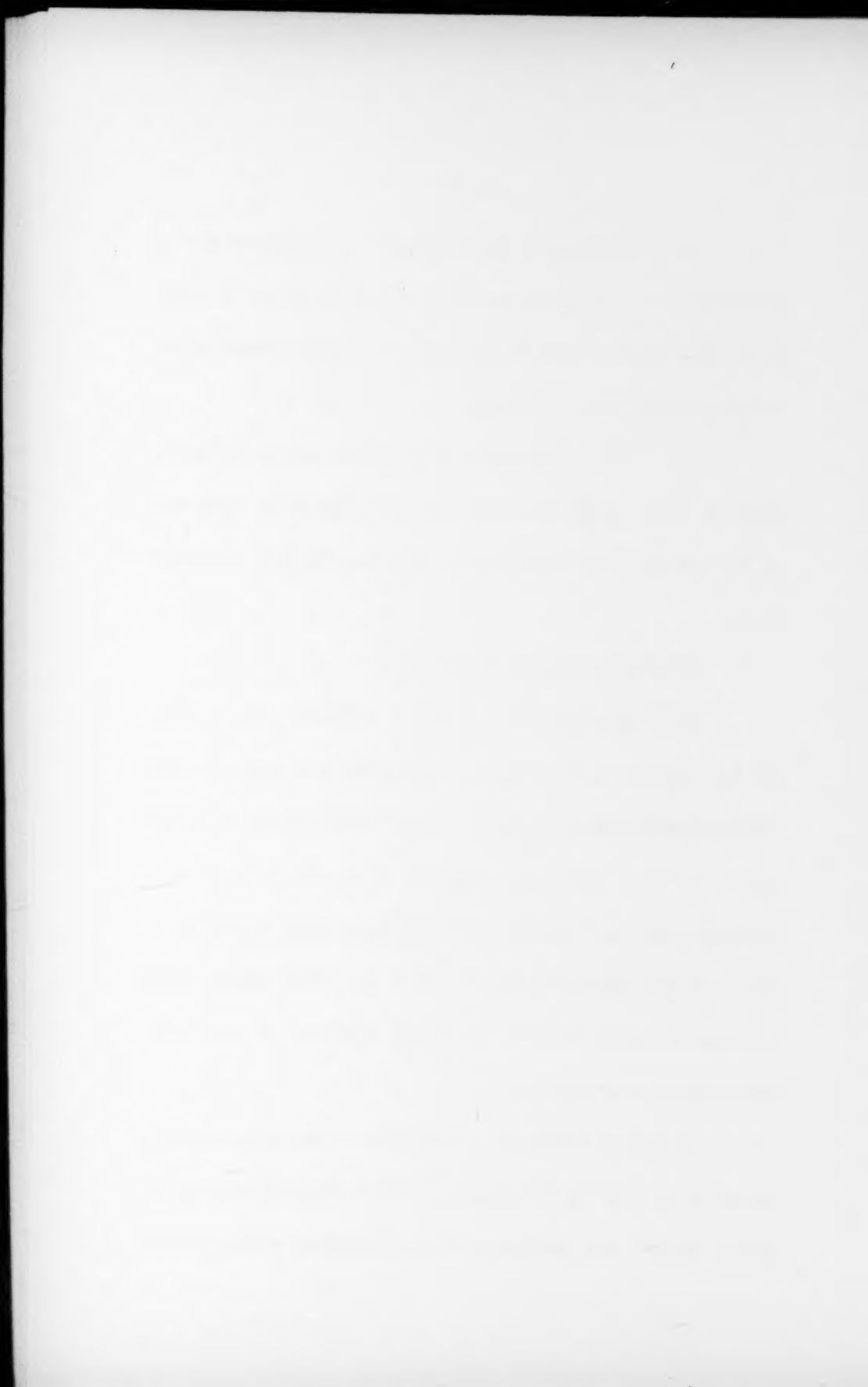
10. Plaintiffs shall submit a complete set of proposed jury instructions five (5) days prior to trial. Defendant shall submit its proposed jury instructions on the morning of the day trial begins.

11. The Statement of the Case set forth below shall be read by the Court to the Jury. No other statement of the nature of the case may be made to the jury by either party.

**STATEMENT OF THE CASE:**

On October 7, 1984, the State of Florida, Department of Agriculture and Consumer Services, as a part of their canker eradication program, commenced burning 137,980 citrus nursery trees belonging to Plaintiff, Mid-Florida Growers, Inc. and 143,594 citrus nursery trees belonging to Himrod and Himrod Citrus Nursery. This destruction continued until October 17, 1988, when all of Plaintiffs' trees had been destroyed.

Based on competent substantial evidence previously heard in this matter it has already been determined that no citrus canker was present at these Plaintiffs' nurseries and

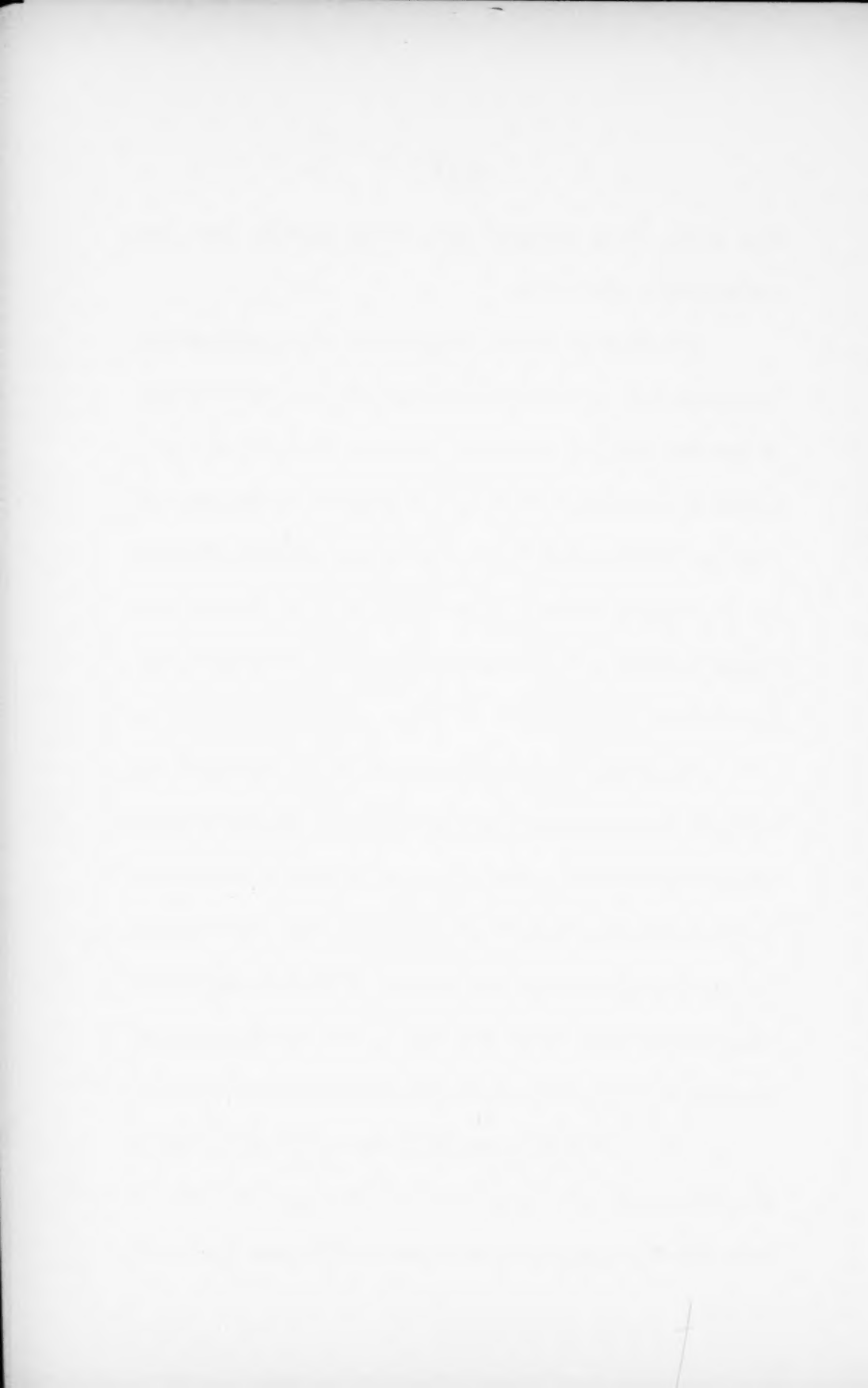


that their citrus nursery trees were healthy and not contaminated with canker.

The State of Florida, Department of Agriculture and Consumer Services is therefore obligated, as a matter of law, to pay full and just compensation to the Plaintiffs for their losses in accordance with the Constitution of the State of Florida. This determination of the Court has been affirmed by the Second District Court of Appeal of Florida and Supreme Court of Florida and may not be questioned in this proceeding.

Your duty will be to determine in this portion of the case, the losses sustained by these Plaintiffs as a result of the Department's actions. The only issue for your determination in this proceeding on damages will be to decide the value of the trees destroyed and the amount of other compensable losses associated with this taking by the Department pursuant to proper instructions given to you by the Court.

12. Plaintiffs and Defendant have agreed that a six person jury with one alternate will be empaneled and that each side shall have three peremptory challenges. Each side



shall have one peremptory challenge in the selection of the alternate juror.

13. The Plaintiffs shall present their cases first and shall be entitled to proceed first on opening statement and closing argument.

14. If the rule of sequestration is invoked at trial, the attorneys for each party shall be responsible for instructing and controlling their witnesses on the obligations of this rule.

DONE AND ORDERED in Chambers at Bartow,  
Polk County, Florida, this 8th day of March, 1988.

J. Tim Strickland  
J. TIM STRICKLAND  
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded by regular United States Mail this 8th day of March, 1988, to M. Stephen Turner, Esquire, Post Office Drawer 11300, Tallahassee, FL 32302; Harry Lewis Michaels, Esquire, Room 515 Mayo Building, Tallahassee, FL 32399-0800; and to Dabney L. Conner, Esquire, Post Office Box 1578, Bartow, FL 33830.

/s/ Polly Rogers  
POLLY ROGERS  
JUDICIAL ASSISTANT



IN THE CIRCUIT COURT OF THE  
TENTH JUDICIAL CIRCUIT, IN AND  
FOR HARDEE COUNTY, FLORIDA

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,  
a Partnership composed of Joe  
Himrod and Joe B. Himrod,

Plaintiffs,

vs.

Case No. CA-G-85-275

STATE OF FLORIDA, DEPARTMENT  
OF AGRICULTURE AND CONSUMER  
SERVICES,

Defendant.

---

FINAL JUDGMENT

Based on the jury verdict and the requirements of  
law, it is hereby ORDERED AND ADJUDGED that:

1. Defendant, STATE OF FLORIDA,  
DEPARTMENT OF AGRICULTURE AND CONSUMER  
SERVICES, is liable to and shall pay Plaintiff, MID-  
FLORIDA GROWERS, INC., the sum of Nine Hundred  
Sixty-six Thousand One Hundred Seventy-seven Dollars  
and ninety-five cents (\$966,177.95), plus 12% interest per  
annum from date hereof, for which let execution issue.





2. Defendant, STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, is liable to and shall pay Plaintiff HIMROD & HIMROD CITRUS NURSERY, the sum of Nine Hundred Seventy-seven Thousand Two Hundred Eighty-one Dollars (\$977,281.00), plus 12% interest per annum from date hereof, for which let execution issue.

The Court reserves jurisdiction to award attorneys fees and costs of this case.

DONE AND ORDERED this 26th day of April 1988.

/s/J. Tim Strickland  
J. Tim Strickland  
Circuit Judge

Copies furnished to:  
M. Stephen Turner  
Dabney Conner  
Harry Michaels  
Mallory Horne

MOTION FILED

JUL 28 1988

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IN THE  
**Supreme Court of the United States**

October Term, 1987

**No. 87-2123**

(4)

DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida, Petitioner,

v.

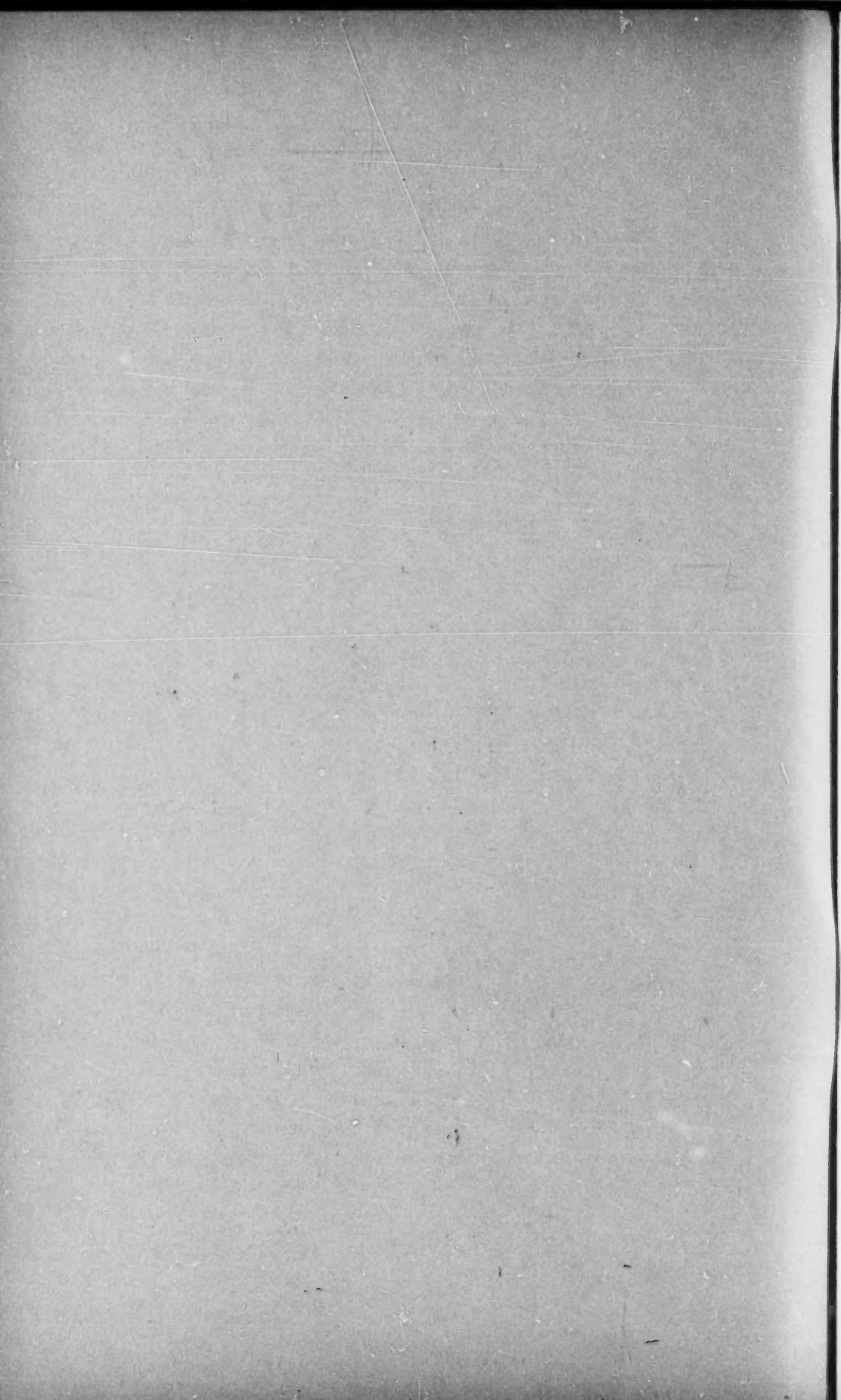
MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY, Respondents

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE IN SUPPORT OF  
PETITIONER, DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES**

DAVID C. G. KERR, ESQUIRE  
Counsel of Record  
SUSAN W. FOX and  
ANDREW K. MACFARLANE, ESQUIRE  
Macfarlane, Ferguson, Allison & Kelly  
Post Office Box 1531  
Tampa, Florida 33601  
Telephone No. (813) 223-2411

COUNSEL FOR AMICI CURIAE:  
LYKES BROS. INC.  
BEN HILL GRIFFIN, INC.  
BOWEN BROTHERS, INC.  
CITRUS WORLD, INC.  
BECKER HOLDING CO.  
ALCOMA PACKING COMPANY, INC.  
DIAMOND R FERTILIZER CO., INC.  
GRAVES BROTHERS CO.  
LATT MAXCY CORPORATION  
SMOAK GROVES, INC.  
NEVINS FRUIT CO., INC.  
LOST LAKE GROVES, INC.  
P.H. FREEMAN & SONS, INC.  
COOPERATIVE FRUIT COMPANY  
JESSAMINE GARDEN GROVES, INC.  
WEST COAST GROWERS COOPERATIVE  
INDIAN RIVER CITRUS LEAGUE  
HANCOCK HOLDING COMPANY  
WINTER HAVEN CITRUS GROWERS  
DERRILL S. McATEER

---



**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

Lykes Bros. Inc., Ben Hill Griffin, Inc., Bowen Brothers, Inc., Citrus World, Inc., Becker Holding Co., Alcoma Packing Company, Inc., Diamond R Fertilizer Co., Inc., Graves Brothers Co., Latt Maxcy Corporation, Smoak Groves, Inc., Nevins Fruit Co., Inc., Lost Lake Groves, Inc., P.H. Freeman & Sons, Inc., Cooperative Fruit Company, Jessamine Garden Groves, Inc., West Coast Growers Cooperative, Indian River Citrus League, Hancock Holding Company, Winter Haven Citrus Growers, and Derrill S. McAteer, hereby move for leave to file the attached Brief *Amici Curiae* in this case. The consent of the Attorney for Petitioner has been obtained. The consent of the Attorney for Respondents was requested but refused.

The interest of the above described *Amici Curiae* arises from the facts stated below.

All but one of the *Amici Curiae* are citrus growers or cooperative associations of citrus growers in the State of Florida, collectively producing more than ten percent of all citrus fruit grown in Florida, and are regulated by the Petitioner, Florida Department of Agriculture and Consumer Services ("FDACS"). The non-citrus grower Amicus, Diamond R Fertilizer Co., Inc., is involved in sales of fertilizer to citrus growers. All of the *Amici Curiae* have an interest in protecting citrus groves from the ravages of citrus canker and other plant pests and diseases.

The *Amici Curiae* believe that the decision of the Florida Supreme Court [*Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery*, 521 So.2d 101 (Fla. 1988)] will greatly affect the ability of the United States Department of Agriculture ("USDA"), and FDACS to regulate plant pests and diseases. The *Amici Curiae* believe that any hesitation by these regulatory agencies in exercising their powers to regulate plant pests and diseases could result in the introduction, release, proliferation, and establishment of undesirable and economically disastrous plant pests and diseases in Florida.

All Florida citrus growers and related industries have in the past received the benefits of regulation by these agencies, including the prevention of spread of plant pests and disease within the State of Florida, and the prevention of introduction of plant pests and diseases from sources outside the State of Florida. Likewise, the citrus growers have suffered the burdens of regulation in complying with the agency's rules and regulations, including the loss of plant material required to be destroyed due to infestation or exposure to plant pests or diseases. Some of the citrus growers appearing as *Amici Curiae* in this Brief suffered outbreaks of citrus canker in their groves or nurseries, and as a result had their citrus plants and trees burned by FDACS and USDA as part of the citrus canker eradication program in Florida.

The citrus growers wish to support the position of the Petitioner in seeking a writ of certiorari because the citrus growers believe that eradication programs, such as the citrus canker eradication program carried out in Florida, are necessary to protect all interests in citrus in the State of Florida. The citrus growers fear that the decision of the Supreme Court of Florida will result in large compensation awards which will inhibit and deter FDACS and USDA from adequately regulating plant pests and diseases in the future. All citrus and other agricultural interests in Florida may be placed at risk by lack of effective regulation.

Citrus canker is only one of many known citrus pests and diseases. Florida citrus growers are already battling numerous citrus pests while many other pests, known to exist in foreign lands have not been introduced or established in Florida or have previously been eradicated. New or unknown pests and diseases regularly arise, either due to importation from foreign sources, or from other unpredictable sources, such as mutation of viral, fungal and bacterial organisms. For these reasons, Florida citrus growers and regulatory officials must continually plan and prepare for the appearance of new pests on Florida citrus. Neither the USDA, FDACS, or any group of recognized scientific experts are able to predict the appearance or behavior of new, unknown, or alien pests and diseases on Florida citrus. The ultimate effects of new, unknown, or alien pests and diseases on Florida citrus

are never fully known even with years of laboratory analysis and scientific testing. For these reasons, an early eradication of new, unknown, or alien pests is essential to the protection of Florida citrus. The maintenance of a disease-free citrus environment in Florida requires that new, unknown, or alien plant pests and diseases be detected and eradicated while the infestation is contained in a small area. Delay or hesitance in initiating eradication programs is likely to permit the infestation to expand to a level that precludes any feasible eradication effort and results in insurmountable losses to the Florida citrus industry and the associated support interests.

A regulatory agency's evaluation of the most appropriate method for controlling plant pests and diseases is an extremely difficult task involving scientific identification of the pest or disease, delimiting the area affected by the disease, analyzing the expected method and rate of spread, and the means available to prevent spread. All of these conditions require extensive scientific study and analysis, whereas the agency is generally required to take action, in advance of complete scientific study and analysis, immediately upon the appearance of a virulent and apparently devastating pest or disease. Scientific controversies and uncertainties frequently occur during the development of scientific data needed to design appropriate programs for control or eradication of plant pests and diseases. If scientific certainty is required prior to agency action, the regulatory agencies will be unable to exercise their statutory powers and duties, and may be required to delay action until the disease or pest has become so widespread that eradication efforts would be futile.

Citrus canker, if established in Florida, would require the citrus growers to institute drastic and expensive treatment and control measures such as frequent application of copper spray to citrus trees, defoliation or destruction of infected trees, disinfection of all equipment and personnel moving through citrus groves, and greater security measures in and around groves.

The citrus growers face threats of embargoes from other citrus growing states and nations if plant pests and diseases, such as



citrus canker, become established in Florida. The potential cost of such embargoes, in terms of lost sales to other citrus growing regions alone would exceed \$359 million! The citrus growers fear that public knowledge of the lack of effective pest or disease control in Florida, or public awareness of the treatment of Florida citrus with excessive chemical sprays such as copper will cause irreparable damage to the reputation of Florida citrus and that consumer acceptance of and demand for Florida citrus may decline.

Neither the Respondents nor any of the other nurseries subjected to eradication procedures have received compensation other than the amounts appropriated by the Florida Legislature and the USDA, as described in the Petition. No funding source for payment of pending and potential damages claims for canker eradication has been created in Florida, but if the State of Florida is forced to pay these claims the Amici Curiae anticipate that the necessary revenues will be raised from the citrus industry, primarily the citrus growers, while the funds would benefit only one small segment of the industry, the nurserymen.

In summary, the citrus growers stand to lose not only the benefits of regulation in attempting to maintain a disease-free environment, but also their valuable property interests in citrus, and may be subjected to additional costs, trade embargoes or quarantines, as well as irreparable damage to the reputation of their citrus products.

The points which Petitioner has not and cannot adequately address are the citrus growers' rights as property owners to have their uninfected groves protected by adequate regulation, the economic impact of trade embargoes, increased costs to growers to battle the spread of disease from neighboring properties, and potential decline in marketability of and demand for Florida citrus. The Petitioners have not addressed the potential loss of

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1. See Florida Department of Citrus, Monthly Report dated June 20, 1988, "Florida's Fresh Fruit Shipments 87-88." The lost sales figure represents only a part of the economic effects of loss of these markets. Other effects would include a general depression of fruit prices due to the resulting glut of fruit going into other markets.

productivity in commercial citrus groves if citrus canker is permitted to spread to and damage existing groves. These concerns are of particular importance to the commercial growers. In general, the citrus growers have a greater familiarity with the effect on commercial citrus growers of the Florida court's ruling, and can provide a different perspective than that submitted by the Department as to the needs of the citrus and agricultural industry as a whole.

Respectfully submitted,

DAVID C. G. KERR, ESQUIRE

Counsel of Record

SUSAN W. FOX

ANDREW K. MACFARLANE, ESQUIRE

Macfarlane, Ferguson, Allison

& Kelly

Post Office Box 1531

Tampa, Florida 33601

Telephone No. (813) 223-2411

ATTORNEYS FOR AMICI CURIAE





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IN THE  
**Supreme Court of the United States**

October Term, 1987

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**No. 87-2123**

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DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida, Petitioner,

v.

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY, Respondents

---

**BRIEF AMICUS CURIAE IN SUPPORT OF  
PETITIONER, DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES**

---

DAVID C. G. KERR, ESQUIRE  
Counsel of Record  
SUSAN W. FOX and  
ANDREW K. MACFARLANE, ESQUIRE  
Macfarlane, Ferguson, Allison & Kelly  
Post Office Box 1531  
Tampa, Florida 33601  
Telephone No. (813) 223-2411

COUNSEL FOR AMICI CURIAE:  
LYKES BROS. INC.  
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## **STATUTES INVOLVED**

The statutes, constitutional provisions, and regulations involved are as stated in the Petition at pages 6 and 7, and as quoted in the Appendix to the Petition at pages 19 through 43.

## **INTEREST OF AMICI CURIAE**

The interest of the Amici Curiae is set forth in their Motion for Leave to File this Brief Amicus Curiae.

## **ARGUMENT**

**THE FLORIDA COURT'S FINDING OF A "TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE IN THE CIRCUMSTANCES PRESENTED (a) FAILS TO RECOGNIZE THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE, AND (b) CONFLICTS WITH DECISIONS OF THIS COURT, OF FEDERAL CIRCUIT COURTS OF APPEAL, AND OTHER STATE COURTS OF LAST RESORT.**

The problem presented in this case is not new. Man's farming efforts have been plagued since Biblical, and even prehistoric times, with destruction of crops by pests and diseases. The ability to control pests and diseases is primarily a phenomenon of the last century, when scientific information concerning the origin and proliferation of such pests first became available. Agricultural regulation began in the United States in the early Twentieth Century in response to the public need for protection from insects and diseases which frequently consumed the agricultural crops of this nation. Agricultural regulations have often required the destruction of plants and animals infected by or exposed to a communicable disease. Prior to the decision below, no court, to the knowledge of these amici curiae, has required compensation for a *reasonable* police power regulation requiring destruction of such plants or animals.



Agricultural growers have always been concerned with the introduction and proliferation of new plant pests and diseases which have the potential ability to destroy their crops. Citrus growers, likewise, have consistently participated in eradication programs directed at eliminating a dangerous organism from an infected area. Complete eradication of a pest or disease requires the detection and eradication of all known organisms, usually by destroying the host plant. Eradication programs have been conducted for numerous citrus pests, including Mediterranean fruit fly, burrowing nematode, tristeza, and citrus canker. Quarantine regulations have been uniformly adopted to prevent introduction of destructive pests. Anticipatory programs, such as the Citrus Canker Action Plan, have provided procedures to be followed when a known pest appears in the United States. These action plans are a result of ongoing scientific study of potential pests and diseases.

In addressing a new disease, both regulatory officials and members of the agricultural industry must rely on available scientific data and technology. A disease imported from a foreign nation, as most of the current agricultural pests have been, may adapt or behave in unexpected ways, in response to, for example, climatic growing conditions and native plants in Florida. Scientific certainty as to the long range effects of any new pest or disease is impossible, but swift regulatory action to combat the pest is necessary since any delay in controlling or eradicating the pest may allow it to spread beyond the reach of any effective eradication or control measure.

Most plant pests and diseases are known to multiply at a geometric rate, based on the numerical population of the disease organism or pest in the environment. In the early stages of an infestation, the population is small, and at that stage eradication is most effective. Any delay in responding to the infestation allows the population of the organism to grow and the area of infection to spread, thus requiring much broader application of eradication and control procedures. For these reasons, early measures to control small infestations are absolutely essential to effective pest

or disease control! This principle has been the fundamental basis for agricultural regulation.

The citrus industry of Florida is the State's second largest industry, and annually generates revenues of approximately \$2.5 billion in total sales. With associated support industries for processing, shipping, packing, and marketing, the total annual economic activity related to citrus production in Florida is \$7 billion.<sup>2</sup> The total acreage of Florida devoted to citrus production is 642,856 acres, which represents a large portion of Florida's arable land.

The Amici Curiae believe the Petitioner Department of Agriculture and Consumer Services has correctly stated the legal principles to be followed in determining whether health and safety regulations, or nuisance type regulations, are takings requiring just compensation under the Fifth Amendment of the United States Constitution. Particularly in the agricultural industry, these regulations are for the common benefit of all agricultural interests, and thus provide the "reciprocity of advantage" essential to maintaining the health, welfare and safety of the entire industry. Contagious or communicable pests and diseases, if allowed to exist on any person's property, pose a threat of transmission to all neighboring properties, and in some instances to distant properties (if an exchange of infected or exposed plant material, equipment, tools or personnel is allowed to take place). Wind, rain, insects and birds, which are some of the primary means of spreading plant pests and disease, follow no predictable territorial boundaries and cannot be confined to a particular property, county, or state. One property owner, if permitted to maintain a communicable disease on his property, poses a threat to all neighboring properties.

The "reciprocity of advantage" as applied to agricultural

1. See generally, T. EMMEL, *Ecology & Population Biology*, 78-98 (1973) ("The more individuals are added to the population, the faster it increases, because all those that are added also breed and hence increase the total growth rate of the population. The process is similar to bank interest compounded daily . . .". *Id.* at 85.)

2. Statistics provided by the Economic Research Department of the Florida Department of Citrus, Gainesville, Florida.

interests is that although each person is burdened to some extent by regulation of plant pests and diseases, each benefits from the regulation of his neighbors. The primary burden of regulation is that when property, with or without fault, is infested by or exposed to an infectious plant pest or disease, and this exposure poses a substantial threat, the exposed property must be destroyed before the disease spreads to another's property. Each owner expects his neighbor to do likewise if this neighbor's property harbors a pest or disease that threatens his own property. Only in this manner is effective regulation achieved.

The Amici Curiae will not reiterate here the compelling arguments made by the Petitioner, setting forth the "nuisance exception" to the takings clause as clearly defined in *Mugler v. Kansas*, 123 U.S. 623 (1887); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. \_\_\_, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). The Amici Curiae merely concur that the current regulatory environment is intolerable, and that the continued existence of a healthy agricultural community in this nation requires that regulatory agencies be permitted to respond reasonably, based on available scientific data and technology, to public dangers such as citrus canker. Effective regulation cannot be achieved where regulatory agencies face massive liability for unanticipated takings.<sup>3</sup>

The Petition filed by the Florida Department of Agriculture and Consumer Services refers to Executive Order 12630, issued by President Reagan on March 15, 1988, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights." 53 Fed. Reg. 8859. This executive order required the United States Attorney General to promulgate "Guidelines for the Evaluation of Risk and the Avoidance of Unanticipated Takings" which had not yet been published at the time the Petition

3. In the few weeks since the filing of the Petition in this case, three additional "takings" law suits have been filed against FDACS. These three claims represent approximately 15% (2.75 million plants) of the total number of canker infected or exposed plants destroyed.

was filed, but became available July 1, 1988.<sup>4</sup> These Guidelines provide a persuasive framework for the development of legal principles distinguishing health and safety regulations from land use regulations in the "takings" analysis. The Guidelines state, in part, at pages 15 and 16:

### **Public Health and Safety**

Policies or actions undertaken to protect public health and safety are ordinarily given greater latitude by courts before being held to give rise to takings. For purposes of that deference, however, the Supreme Court has ruled that 'public health and safety' is not coextensive with the government's power to act. Public health and safety represents a component of that broader power. Again, that governmental power exists does not mean that its exercise is free of takings concerns. The deference discussed here extends only to public health and safety interests.

- a. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use to be regulated must be identified with as much specificity as possible and should be 'real and substantial.' That is, it must be more than speculative. It must present a genuine risk of harm to public health and safety and the claim of risk of harm must be supported by meaningful evidence, in light of available technology and information, that such harm may result from the use to be regulated.
- b. Any action taken to regulate property use for public health and safety purposes must address the health and safety risk; that is, it must be

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4. The Guidelines have not been published in the Federal Register, but are available upon request from the Attorney General. A copy of the Guidelines have been filed with the Clerk of this Court.

designed to counter the identified risk and must substantially advance the public health and safety purpose. The action should also, within the limits of available technology and information, be no more restrictive than necessary to alleviate the health and safety risk created by the use to be regulated.

- c. In assessing these issues, an agency should examine the following facts:
  - (i) The certainty that the property use to be regulated poses a health and safety risk in the absence of government action; and
  - (ii) The severity of the injury to public health and safety should the identified risk materialize, based on the best available information in the field involved.

From the perspective of a takings implication analysis, the greater the certainty or the greater the severity, the more stringent measures are justified.

- d. Although the ideal is that the response taken to counter the risk be 'no greater than' the risk posed, reasonable proportionality presupposes available technology and information.

If these Guidelines are applied to the instant case, the record supports the following conclusions:

- (a) The health and safety risk of citrus canker was identified with specificity, and the risk was real and substantial, as demonstrated by the consensus of scientific experts in developing the Citrus Canker Action Plan. There was no doubt that citrus canker presented genuine risk of harm based on available technology and information, as reflected in the Action Plan and in the recommendations of the technical advisory committees, which forcefully recommended that federal and state regulatory officials institute an immediate eradication program as to both infected and exposed plants.

(b) The action taken did address the risk posed by citrus canker, was consistent with the recommendations of scientific and technical advisers, and was no more restrictive than necessary to alleviate the risk created. Respondents' own expert witness testified at trial that he too voted in favor of, even seconded the motion, to adopt the emergency rule which resulted in destruction of Respondents' exposed plants.

(c) In assessing the risk posed by the outbreak of citrus canker in Florida the regulatory agencies (i) determined the apparent virulence (ability to spread) of the organism found at Ward's Nursery in August 1984 based on the number of trees infested there, the apparent rate of spread, and the fact that the bacteria spreads invisibly to nearby plants which may harbor the bacteria without symptoms for many months; and (ii) determined that citrus canker can cause severe damage to citrus plants by causing leaf drop, defoliation, fruit drop, reduction in tree growth and fruit production, fruit blemish, and eventually tree decline. In other words, the scientific community knew with relative certainty that severe injury to the citrus industry of Florida would occur if citrus canker became widespread.<sup>5</sup>

5. The background statement to the interim rules issued by USDA on September 14, 1984, contains the following discussion of citrus canker which reflected the scientific knowledge at that time:

"Citrus canker, *Xanthomonas campestris* pv. *citri* (Hasse) Dawson, is a devastating bacterial disease which is known to infect plants and plant parts of citrus and citrus relatives (Family Rutaceae). Strains of citrus canker can cause defoliation and other serious damage to the leaves, twigs, and fruit of such plants. It can be a very aggressive disease. It can rapidly infect plants and plant parts, and can cause the destruction of entire citrus growing areas. The establishment of citrus canker in the United States would present a severe threat to citrus producing industries in the United States and pose a burden to interstate and international commerce.

An infestation of citrus canker was found in plants in a nursery in Polk County, Florida, on August 27, 1984. As a result of investigations and surveys by inspectors of Plant Protection and Quarantine (PPQ), a unit within the Animal and Plant Health Inspection Services, U.S. Department of Agriculture, and officials of the Florida Division of Plant Industry (FDPI), a unit within the Florida Department of Agriculture and Consumer Services, it has been determined that plant cuttings from infested nursery stock and plants exposed to infected nursery stock have been sent to over 40 other nurseries and numerous commercial citrus groves for planting in at least 17 counties in Florida. These surveys and



(d) The agency response, i.e. the emergency rules and quarantine regulations, followed available scientific technology and information in designating the infected and suspect trees to be destroyed, and in enacting other measures to prevent the spread of citrus canker to uninfected areas.

If the legal principles concerning the validity of this kind of health and safety regulation were clarified as requested in the Petition, takings issues in these cases should not arise, absent a court finding that the agency determination of public health risk or the measures taken in response to the perceived risk were arbitrary and unreasonable. Sadly, the current case law presents only hazy guidelines, resulting in the regulatory crisis reflected in Executive Order No. 12630, and court decisions such as that of the Supreme Court of Florida below. The legal rules, specifically the decisions of this Court, must be clarified in order to permit agencies administering health and safety regulations to regulate responsibly, free from the threat of unanticipated takings claims.

The memorandum of law published as an Appendix to the U.S. Attorney General's Guidelines is consistent with the legal theories espoused in the Petition, but shows the difficulty of predicting whether a regulatory action will constitute a taking. The Attorney General's memorandum states that the courts have evidenced a 'hesitance' to find takings where the purpose of regulation is to restrain uses of property that are tantamount to nuisances, and that the "reciprocity of advantage" test ("that, in demonstrable

investigations are continuing, but complete identification of all areas in Florida to which the citrus canker infestation has spread has not yet been determined.

Further, the strain of the bacterial pathogen which causes the form of citrus canker now in Florida has not previously been described. However, intensive pathological studies are underway to determine the full host range, possible effect on fruit, and other pathological characteristics of this particular strain.

Officials of PPQ and FDPI have begun an intensive citrus canker eradication program in the infested areas of Florida. However, since this disease could have spread throughout the State, it is necessary to designate the entire State of Florida as a quarantined area and regulate the interstate movement of certain articles from any place in Florida in order to prevent the artificial spread of the citrus canker to noninfested areas of other States." 49 Fed. Reg. 36623.

ways, each who is regulated benefits from similar regulations of others''<sup>6</sup>) is an important factor in obtaining judicial deference. The Attorney General's memorandum observes, however, that the result of any regulatory takings analysis "is not fully predictable."<sup>7</sup>

The Amici Curiae submit that the result of a takings analysis, especially as to health and safety regulations, should be predictable and indeed must be predictable to insure the continuance of an effective regulatory environment, not only in Florida but throughout the United States.<sup>8</sup> Regulatory officials will be unlikely to destroy infected or exposed plants or animals if they know that they are, in effect, "buying" them at full value.

As suggested in the Attorney General's Guidelines, regulatory response to public health and safety risks must be reasonably proportional to the identified risk, and be no more restrictive than necessary to alleviate the risk. However, these determinations must be made "within the limits of available technology and information," and the ideal of reasonable proportionality "presupposes available technology and information." The information available to FDACS, USDA and the scientific and agricultural community in this case demanded a swift canker eradication program, and required destruction not only of visibly infested plants, but of suspect plants or trees which had been in close proximity to the infested plants and therefore were exposed to and capable of harboring citrus canker. The Florida court's characterization of the plants as "healthy" belies the known fact that these plants were at substantial risk of developing citrus canker. Six nurseries that had received budwood from Ward's Nursery, where citrus canker was first detected, and two that had received plants from Adam's Nursery which received the infection from Ward's, had already tested positive for citrus canker. It was a proven fact that canker had been spread by the movement of

6. Guidelines Appendix Part III, F, 5 at pages 12-13, reproduced at A-1 and 2, *infra*.

7. Guidelines Appendix Part III, F, 4 at page 11.

8. The Solicitor General should be invited to file a brief in this case, since the issue presented vitally concerns the USDA as well as other federal agencies administering health and safety regulations.



plant material from Ward's. The available information did not allow FDACS to wait for Respondents' plants to exhibit visible symptoms.

Effective agricultural regulation requires participation by both state and federal agricultural agencies because agricultural pests and diseases do not confine themselves within state lines. The State of Florida has no right to delay eradication and control of plant pests or diseases which may spread to and destroy agricultural property in Alabama, Georgia or other parts of the nation, any more than Respondents had a right to maintain citrus canker exposed plants on their property with the real and substantial threat of transmitting that disease to their neighbors.

Respondents, through expert testimony presented in this case, argued that there should have been no restriction even on the sale of their exposed citrus plants, stating "it's a matter of buyer beware." There is no doubt that the lack of effective regulation would return this state to a "buyer beware", self-protectionist philosophy, which in effect would be a return to the dark ages of agricultural commerce and disease control. Without the USDA's active involvement in eradication of plant diseases, the "buyer beware" attitude is likely to cause states to be wary of allowing commerce in agricultural commodities from other states. The widespread effect of the Florida citrus canker crisis is easily demonstrated by how other citrus producing states reacted to this public nuisance. During this crisis, the State of Florida was subjected to citrus embargoes and quarantine orders from numerous other citrus producing states, in addition to the USDA quarantine order cited in the Petition. After the USDA modified the quarantine on Florida citrus in February 1988 [see 53 Fed.Reg. 3999, amending 7 CFR 301.75], other citrus producing states again reacted by enacting or threatening embargoes of Florida citrus fruit.<sup>9</sup> Florida citrus growers have annual sales of more than \$359 million to other citrus producing areas which could be lost in the event of future embargoes.

9. See Texas Department of Agriculture Emergency Rules 5.500-5.504; Louisiana Department of Agriculture Rule 7-9501 et. seq.

Florida has been successful in negotiating voluntary withdrawal of or obtaining injunctions against enforcement of these embargoes, *see e.g., Florida Citrus Mutual, et al. v. Hightower*, Order dated March 3, 1988, Case No. A-88-CA-159, U.S. District Court, Western District of Texas. In large part however, Florida officials have been successful in having these embargoes lifted due to the ongoing eradication effort in Florida based on the treatment and quarantine protocol established by the Citrus Canker Technical Task Force and the Joint Federal/State Citrus Canker Technical Advisory Committee. In the absence of a successful eradication, treatment and quarantine program, future embargoes from other citrus producing states, as well as foreign nations, such as Japan, are likely.

Some of the world's leading experts on citrus canker are members of the Citrus Canker Task Force and the Technical Advisory Committee which have formulated the policies that have influenced USDA and FDACS in adopting eradication measures and quarantine regulations which have had a substantial economic impact on the citrus growers as well as citrus nurseries. One of the ongoing restrictions on shipment of Florida citrus under the protocol established by the USDA with the advice of these committees is that in order to qualify for a certificate for interstate movement of fruit, the grove producing the fruit must be at least one-half mile from any property that has contained infested or exposed plants during the previous two years, and that in the area within five miles from the grove all infested or exposed plants have been destroyed. *See, e.g., 7 CFR Section 301.75-7(b)*. Thus, commercial citrus growers continue to face restrictions on movement of their fruit based on conditions on surrounding properties.

Agricultural industries have come to expect agricultural agencies to protect their properties from the spread of destructive pests and diseases. The lack of effective regulation may result in takings claims through the failure to provide adequate protection, as demonstrated by a case decided two years before the canker outbreak in Florida, *South Florida Growers Association, Inc. v. U.S. Department of Agriculture*, 554 F.Supp. 633 (S.D. Fla. 1982).

Thus, regulatory agencies are placed in the untenable position of potential liability for either action or inaction. Regulatory paralysis may be the ultimate consequence.

The determination of what constitutes a threat to public health and safety is a matter largely within the power of the legislature, and is not a judicial function. *Powell v. Pennsylvania*, 127 U.S. 678 (1888), cited with approval in *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*, 94 L.Ed.2d at 491. As this Court observed more than 70 years ago in *Sligh v. Kirkwood*, 237 U.S. 52 (1914), in discussing the legislature's power to regulate the citrus industry:

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. . . . The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. 237 U.S. at 61.

The Florida legislature has now delegated its power to the Florida Department of Agriculture and Consumer Services, just as Congress has delegated its power to the USDA.

Similar agencies exist in virtually every state. These agencies are staffed by agricultural and scientific experts with sufficient knowledge of plant pathology and animal husbandry to carry out the duties delegated to them for the protection of the public, for improvement of agricultural industry and for the protection of state and national economies and food supplies.

Agricultural inspection agents at state borders are not uncommon, and ordinary citizens daily suffer "takings" of

agricultural commodities which are not permitted to cross state lines. Criminal penalties for violation of agricultural regulations are also not uncommon, and civil liability against owners of diseased plants and animals who cause infection to third parties has also been recognized. It is impossible to reconcile these facts with the Florida court's determination that Respondents' Fifth Amendment rights were violated when the state agricultural officials destroyed their exposed plants.

The Amici Curiae are not suggesting that agricultural agencies be given absolute power or that the reasonableness of their actions be exempt from judicial review. Rather, we submit that the reasonableness of the regulation either as enacted or as applied be determined before any question of compensation can arise. If the regulation is reasonably justified for public health and safety purposes, a court should not be permitted to require compensation.

In this case, the Florida legislature and the USDA did make provisions for compensation to persons affected by citrus canker. This compensation was not in response to any perceived Fifth Amendment right, but was merely a recognition that the state and national economies would benefit by allowing the nurserymen affected by the eradication program a sum of money for replenishment of their crops. This type of compensation program is no different from any other form of disaster aid.

The writ should be granted in this case in order to clarify the legal rules applicable to destruction of infected or exposed plant and animals by agricultural agencies and to insure continued effective agricultural regulation as well as continued federal and state cooperation in agricultural programs. The litigation in this case has effects far beyond the immediate parties before the Court and has far reaching implications as to federal and state agricultural regulation and health and safety regulation in general.

## CONCLUSION

The Amici Curiae urge the Court to grant the Petition for Writ of Certiorari, as requested by Petitioner.

Respectfully submitted,

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DERRILL S. McATEER

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# **APPENDIX**



**APPENDIX TO GUIDELINES FOR THE EVALUATION  
OF RISK AND AVOIDANCE OF UNANTICIPATED TAKINGS  
(Part III, F., 5.)**

**Regulation in the Service of  
Public Health and Safety**

[See Executive Order No. 12630, § 4(d);  
Guidelines, § V (C) (2)]

**a. In General: Deference in Matters of  
Public Health and Safety**

In evaluating government regulatory conduct under the Takings Clause, courts have evidenced a "hesitance" to find takings where the public purpose of the underlying legislation is to "restrain[ ] uses of property that are tantamount to public nuisances . . ." *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245. Important to claiming the deference shown in such public nuisance regulation is recognition of the concept of "reciprocity of advantage" — that, in demonstrable ways, each who is regulated benefits from the similar regulation of others. *Id.* Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition of liquor sale in interest of health, safety, or morals of public); *Euclid v. Ambler*, 272 U.S. 365 (1926) (in a facial challenge, conclusion that noise and traffic might be very nearly a public nuisance in an area; thus, regulations bore substantial relationship to public welfare); *Miller v. Schoene*, 276 U.S. 272 (1928) (nuisance rationale sustains state's destruction of cedar rust trees); *Goldblatt v. Hempstead*, 369 U.S. 590, 595-596 (1961) (safety based regulation prohibiting further excavation of sand and gravel mine below water table not unreasonable; plaintiffs' failed to meet burden of showing that prohibition would further reduce value of property or that regulation unreasonable).

**b. Deference Not Coextensive with "Public Use"**

Although "public use" for purposes of the Fifth Amendment is coterminous with the government police power (Section III(B)(3), *supra*) the deferential "nuisance exception" discussed here is not coextensive with the police power. *Keystone Bituminous Coal Association v. De Benedictis*, 107 S. Ct. at 1245, n.20. In other words, even when governmental action is designed to protect health and safety, some consideration of that action's economic impact may nevertheless be appropriate. Thus, *Florida Rock v.*



*United States*, 791 F.2d 893, 902 (Fed. Cir. 1986) has cautioned that a "regulation under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe."

**c. Executive Order and Guidelines Requirements**

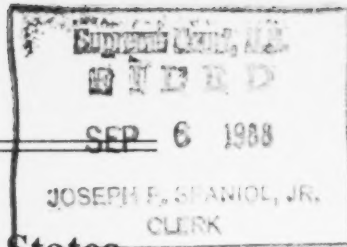
[See Executive Order 12630, § 5(d); Guidelines, § VI(A)]

With respect to public health and safety directed actions, then, management must, in any internal deliberative documents and any submissions to the Director, Office of Management and Budget, that are required:

- i. Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;
- ii. Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;
- iii. Establish to the extent possible, that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and,
- iv. Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. See § V, *infra*.

Under the Guidelines procedure, this reporting is accomplished by completion of the TIA process and consideration of the factors identified in Section V(C)(2) of the Guidelines for public health and safety actions. The "required submissions" are defined in Section VI(B) of the Guidelines.





IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1987

No. 87-2123

DEPARTMENT OF AGRICULTURE  
AND CONSUMER SERVICES,  
an agency of the State of Florida,

*Petitioner,*

v.

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY,

*Respondents.*

**RESPONDENTS' RESPONSE TO  
BRIEFS OF AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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RESPONDENTS' RESPONSE TO  
BRIEFS OF AMICI CURIAE  
IN SUPPORT OF PETITIONER

The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, has sought review of a decision of the Florida Supreme Court requiring payment for Florida's destruction of Respondent Nurserymen's healthy citrus trees. The Attorney General of Florida has filed an amicus brief seeking to buttress the arguments already made by the State of Florida. Various citrus growers have also filed an amicus brief suggesting, inter alia, that "if the State of Florida is forced to pay these claims, the Amici Curiae anticipate that the necessary revenues will be raised from the citrus industry, primarily the citrus growers. . . ." Motion for Leave to File Amicus Curiae Brief of Lykes Bros., et al., p. 4.

Neither amicus submission presents compelling arguments in favor of review. Indeed, both briefs help to demonstrate that the Florida Supreme Court's decision represents a fair application of Florida law to Florida's concern about citrus canker, negating any need for review by this Court.



A. The Amicus Brief of the "States"

The Attorney General of Florida writes that the decision below "nullifies this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928)." Amicus Curiae Brief of Florida, et al., p. 2. The decision below belies that assertion. Miller v. Schoene was never mentioned by the Florida Supreme Court in reaching its conclusion that nursery owners must be compensated for the destruction of their healthy trees. The lone dissenter did not posit Miller v. Schoene as a reason for his disagreement. He believed "the evidence fails to support a claim for inverse condemnation" and cited only Florida cases to support his dissent. Petition Appendix A 7-8. We have already discussed Miller v. Schoene in Respondents' Brief in Opposition to Certiorari, pp. 19-20. The Florida Attorney General's repetition of the Miller argument previously made in the Florida Department of Agriculture and Consumer Services' certiorari petition adds little, except to illuminate the Florida focus of the decision below.



The Florida Attorney General's attempt to persuade by recounting alleged trial testimony regarding "scientific information," "scientific literature" and the trial court's "ignoring the testimony that the state had relied on scientific opinion" (Amicus Curiae Brief of Florida, et al., pp. 13-15) underscores the fact that Florida's quarrel is much more evidentiary than constitutional. Two Florida appellate courts have heard Florida's similar factual arguments. Both courts rejected them in favor of a Florida rule that the State should compensate the Respondents.<sup>1</sup> Petition Appendix, pp. A 1-9; A 10-16.

The Florida Attorney General concludes by saying that "[a] productive and healthy citrus industry is vital to Florida" and that by requiring compensation, the Florida Supreme Court has "[c]urtail[ed] the power of the state to

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<sup>1</sup>In point of fact, trial testimony established that the State was not implementing a carefully planned policy based on scientific study. The canker action plan in effect when symptoms appeared at Ward's Nursery contained no policy calling for any action in the situation here. The State developed the policy requiring destruction of Respondents' trees in an emergency meeting after the incident at Ward's and immediately implemented that policy against Respondents. An expert witness who was present at that meeting testified that action was not taken based on knowledge, but on panic.



fight disease" and "threaten[ed] the livelihood" of the state's citizens. Amicus Curiae Brief of Florida, et al., pp. 26-27. The Florida Supreme Court, and the Florida District Court of Appeal for the Second District, cognizant of the state's concerns, considered those arguments and rejected them in favor of the compensation which was required under the applicable Florida precedents.

The Attorney General of Florida has provided no principled basis for this Court to invoke certiorari jurisdiction.

B. The Amicus Brief of the Growers

The growers' interest in canker eradication, in preserving consumer acceptance and demand for Florida citrus, and in avoiding revenue enhancement measures to compensate persons injured by the canker eradication program (Motion for Leave to File Amicus Curiae Brief of Lykes Bros., et al., p. 4) are not the stuff of certiorari.<sup>2</sup>

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<sup>2</sup>The appearance of these growers as proposed Amici should not be taken as reflecting widespread industry support for the Petition. No statewide industry association, nor the Florida Citrus Commission,





The source of funds for compensating Respondents is a matter for the Florida legislature. The authority to conduct citrus canker programs is not at stake here. The growers' hyperbole that effective regulation is impaired is not supported by the record.<sup>3</sup>

The Florida Supreme Court decision poses no barrier to emergency state action in response to a perceived need. It simply concluded that on the facts of this case, compensation was required under Florida precedent:

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nor other large citrus producing states, nor even the USDA, has supported the Petition.

<sup>3</sup>Destruction of Respondents' healthy trees was wholly unnecessary to prevent disease or imminent danger. Respondents' budwood was removed from Ward's Nursery four months before any infection occurred there. If any of Respondents' trees had been diseased, trial testimony established that they would have shown symptoms within 6 to 15 days. But no symptom or disease, or even opportunity for disease, was present. The State took the most extreme measure against Respondents' nurseries, yet failed to take any action whatsoever as to the thousands of trees they had transferred to other premises, which trees (under the Department's logic) would also have been dangerous. In addition, the State subsequently abandoned entirely the policy of wholesale destruction in favor of simply removing any infected plants from the nursery. The Motion acknowledges that the impetus behind the Department's precipitous action was to protect the reputation of Florida citrus and maintain consumer acceptance and demand. Motion, p. 4.



As the district court below correctly observed, "[w]hether regulatory action of a public body amounts to a taking must be determined from the facts of each case. . . ."The trial court's determination of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence. . .

A review of the record in this case reveals substantial competent evidence was presented at trial on which the trial court based its findings that the trees were healthy.

Petition Appendix A 5.

Therefore the Court held the nursery owners must be compensated. That decision was not stayed. A subsequent trial was held in state court in which the Respondents obtained a compensation award solely under the mandates of the Florida Constitution. See Brief in Opposition to Certiorari, pp. 6-9.

Neither the decision below, nor the subsequent proceedings which awarded compensation pose a federal question, or a national concern, meriting review by this Court. The simple conclusion is that in Florida, if the State destroys healthy trees as part of its canker eradication program, it must pay for those trees. Therefore both the State's interest in preserving its citrus industry and its



interest in protecting the rights of its citizens under the State Constitution are served, and the Fifth Amendment is not implicated.



CONCLUSION

For these reasons, and the reasons advanced in the  
Brief in Opposition, this Court should deny certiorari.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM 1987

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NO. 87-2123

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DEPARTMENT OF AGRICULTURE AND CONSUMER  
SERVICES, an agency of the State of Florida, *Petitioner*,

v.

MID-FLORIDA GROWERS, INC. and  
HIMROD & HIMROD CITRUS NURSERY, *Respondents*.

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**REPLY TO BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

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The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, respectfully submits this Reply to the issues first raised in the Respondents' Brief in Opposition to Petition for Certiorari.

a. *The Destruction of Exposed Citrus Plants Was Justified As A Reasonable Valid Exercise Of The Police Power To Control A Public Nuisance.*

Respondents have contended throughout this case that they need not prove the emergency citrus canker regulations were unreasonable.<sup>1</sup> In following this assumption the Supreme Court of Florida did not consider the propriety of the emergency rules

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<sup>1</sup> During the trial, Respondents' counsel stated "We are not trying the regulatory program. . . . We're not attacking their ability to take emergency action. That's up to them and that's fine. The question is did the trees have value on the date of the taking. And that's the only issue we're dealing with in this case." (Transcript of Trial, p.124).

which defined the trees as suspect and subject to destruction and stated "we do not disagree with the Department's contention that the State's order was a valid exercise of police power." Rather, the Court simply held that a valid exercise of the police power may still result in a taking, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. \_\_\_, 96 L.Ed.2d 250 (1987). In continuing to compound this error, Respondents have, in their statement of the question presented, asserted that compensation is required since their citrus plants were "healthy and harmless" and posed "no imminent danger . . . to warrant destruction". As a result, the Brief in Opposition is not responsive to the central constitutional issue presented by Petitioner — under what circumstances may Petitioner's valid exercise of police power, under its regulations to control the spread of a public nuisance, result in an unconstitutional taking for which just compensation is required.

Petitioner has asked this Court to clarify its takings jurisprudence as it relates to the enforcement of safety regulations. This Court indicated in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. \_\_\_, 94 L.Ed. 472, 492 at n.22 (1987) that the initial question in applying the nuisance exception is whether the states' action was justified:

"the issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, the question is resolved against the claimant." [quoting, R. Epstein, *Takings*, at 199].

The opinion of the Florida Supreme Court and Respondents' Brief in Opposition is founded on the improper assumption that the question of justification may be determined in "hindsight". As explained in the dissent of Chief Justice McDonald, the question of justification should be whether the government acted reasonably in response to a perceived emergency:

The department had the duty to take emergency measures to prevent an immediate harm - the spread

of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation. 521 So.2d at 106.

Thus, Respondents in their Brief in Opposition have attempted to avoid this issue altogether by adopting the major premise that the destruction of the trees were not necessary. This assumption is clearly inappropriate where it presupposes that the issue of justification may be exclusively decided in judicial hindsight.

*b) The Decision Below Presents A Case Or Controversy For This Court.*

The burden of demonstrating mootness is a heavy one. See *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This case certainly is not moot. After the Florida Supreme Court affirmed the order of liability for taking, this case was tried on the damages issue and a final judgment was entered, however, that judgment has not been paid and further proceedings to review the amount of damages awarded are pending in the Second District Court of Appeal of Florida. The Petitioner has an automatic stay of the judgment pending such review.<sup>2</sup> Should a further stay become necessary to preserve this Court's jurisdiction in these certiorari proceedings, the Petitioner will seek and obtain such a stay.

The Respondents suggest that a reversal by this Court of the Florida Supreme Court's finding of liability for a taking would not affect the final judgment on damages because the

<sup>2</sup> The Florida Rules of Appellate Procedure, Rule 9.310(b)(2), state: "The timely filing of a notice [of appeal] shall automatically operate as a stay pending review, . . . when the State, any public officer in an official capacity, board, commission, or other public body seeks review . . .".



Respondents "have already prevailed at trial on non-federal grounds." (Brief in Opposition, page 7). The flaw in this argument, of course, is that the damages judgment is predicated upon the decision below, i.e., that Petitioner is liable for an unconstitutional taking. The subsequent trial was not on the merits of the Respondents' takings claim, but on the issue of compensation alone.<sup>3</sup> The Respondents thus erroneously conclude that their "right to compensation has already been decided solely upon state law" (Brief in Opposition, page 8), and that they have "already established and won their claim under the state constitution" (Brief in Opposition, page 9), because the compensation issue was tried solely on state law.

If this Court reverses the holding that a taking occurred in this case, the final judgment predicated on the order of taking and the subsequent trial on damages will be nullified. Rather than establish mootness, the Respondents' argument demonstrates that the federal issue presented in this case is final for purposes of 28 U.S.C. Section 1257 under the rule stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Reversal of the Florida Supreme Court's finding of liability for a taking would preclude further litigation on the question whether the Fifth and Fourteenth Amendments of the U.S. Constitution require just compensation in this case. Respondents' argument therefore merely affirms Petitioner's contention that the remaining litigation does not raise other federal questions which might be brought to the Court in later proceedings for review, and that the federal issue, finally decided by the highest court of the State of Florida, will survive and require a decision regardless of the outcome of further proceedings. This satisfies the first and second categories of finality outlined in *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 479-80.

<sup>3</sup> The subsequent trial admittedly raised only state law issues since Florida courts apply the same rules to both eminent domain and inverse condemnation proceedings in awarding damages. See *County of Volusia v. Pickens*, 439 So.2d 276 (Fla. 5th DCA 1983). Logic and reason is deemed to compel equal treatment. *Id.* at 277. Chapter 73, Florida Statutes, establishes the elements of compensation awardable in eminent domain proceedings, and Petitioner and Respondents have agreed that these standards are more liberal than federal compensation standards.

Similarly flawed is Respondents' argument that "[i]f a dispositive federal issue had existed [in this case], the opportunity to present it for review in this Court has passed." (Brief in Opposition, page 13 at n.6). It is difficult to conceive when Petitioner may have had a prior opportunity to present this case for review in this Court, and how this Court's jurisdiction over the dispositive federal issue could have been thwarted by the Respondents' manipulation of interim events. Indeed, this Court has shown a willingness to review a federal issue which has been finally decided but may become mooted by subsequent circumstances. *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 481.

While clothing this argument in the doctrine of mootness, the Respondents' true focus appears to be on the alleged absence of a federal question since, they contend, their rights were established based solely on the Florida Constitution. As summarized in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138 (1984), this Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." Because the Florida Supreme Court erred in understanding cases of this Court and provisions of the United States Constitution, this Court should so declare and leave the state court to decide the issue solely as a matter of state law. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). Since the Florida court's decision is inextricably interwoven with federal law, and there is no "plain statement" enunciating a separate state ground for decision, this Court must presume that the Florida Supreme Court decided this case the way it did because of its misapprehension of federal constitutional law. *Michigan*

*v. Long*, 463 U.S. 1032 (1983).<sup>4</sup> This Court is not prohibited by the case or controversy requirement of Article III from vacating the judgment of the state court and remanding the case so that the state court may reconsider the state law question free from misapprehension about the scope of federal law. See *Three Affiliated Tribes*, *supra*.

The takings issue clearly was not determined solely on the Florida Constitution or on other state law grounds. The opinion of the Supreme Court of Florida relies upon three decisions of this Court construing the Fifth Amendment takings clause.<sup>5</sup> Each of the four Florida cases cited also rely upon federal constitutional grounds. The two cases Respondents refer to as “freestanding authority” to show an independent state ground for a decision, likewise rely upon the U.S. Constitution and this Court’s construction of federal constitutional law in reaching their decisions.<sup>6</sup> The decision of the Supreme Court of Florida itself men-

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<sup>4</sup> In applying the presumption of *Michigan v. Long*, this Court has never required that the federal cases cited in a state supreme court opinion be “free-standing authority” and has found a state supreme court to be interwoven with federal law when the opinion “makes use of both” federal and other opinions from that state “in its analysis, generally citing both for the same proposition.” See *New York v. Class*, 475 U.S. 106, 109 (1986). See, also, *Delaware v. Van Arsdall*, 475 U.S. 673, 678, n.3 (1986). Inasmuch as the Florida Supreme Court gives no indication that Respondents’ rights under Article X, Section 6 were distinct from, or broader than Respondents’ right under the Fifth Amendment, it may be presumed under *Michigan v. Long* that this opinion is interwoven with federal law. See *Kentucky v. Stincer*, 482 U.S. \_\_\_\_ 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), *Maryland v. Garrison*, 480 U.S. \_\_\_\_, 108 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

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<sup>5</sup> Those cases are *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*; and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, *supra*.

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<sup>6</sup> In *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), the Court specifically cites the Fourteenth Amendment of the U.S. Constitution and relies upon *Mugler v. Kansas*, 123 U.S. 623 (1887), as well as cases from other jurisdictions discussing federal constitutional standards. *Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957) is likewise intertwined with the federal constitution. It cites to the Fourteenth Amendment of the U.S. Constitution, and relies on Florida cases decided based on federal constitutional grounds. For example, the *Corneal* decision expressly relies upon *Campoamor v. State Livestock Sanitary Board*, 136 Fla. 451, 182 So. 277 (Fla. 1938), which expressly relies upon *Miller v. Schoene*, 276 U.S. 272 (1928) and treatises on the federal constitution.

tions the Fifth Amendment once and the Florida Constitution only once.<sup>7</sup> The terms “full” and “just” compensation are used indiscriminately, referring respectively to the Florida and Federal Constitutions.

The Supreme Court of Florida “approve[d] the decision of the district court” which even more clearly relied expressly and solely on federal constitutional grounds. The decision of the district court cites the Fifth Amendment of the U.S. Constitution twice, and does not cite to the Florida Constitution at all. It relies upon six cases of this Court including three of the leading cases, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Goldblatt v. Hempstead*, 368 U.S. 590 (1962) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), construing the Fifth and Fourteenth Amendments. The Florida cases cited in the district court’s opinion are also directly traceable to this Court’s leading decisions on Fifth Amendment takings law.<sup>8</sup>

The Respondents’ own Brief submitted to the Florida Supreme Court clearly reveals that Respondents were seeking to establish their taking claim under the Fifth and Fourteenth Amendments of the United States Constitution. To illustrate this fact, Petitioner has included in the Appendix to this Reply the first two pages of the “Argument” section of Respondents’ Brief to the Supreme Court of Florida. Repeated reference is made to the Fifth Amendment, but nowhere in the Brief is the Florida Constitution even cited as a ground for a decision.

<sup>7</sup> 521 So.2d at 103.

<sup>8</sup> *Albrecht v. State*, 444 So.2d 8 (Fla. 1984) and *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.), cert. denied, sub nom. *Taylor v. Graham*, 454 U.S. 1083 (1981), were decided on the express authority of *Pennsylvania Coal v. Mahon*, *supra*; *State Plant Board v. Smith*, *supra*, as shown above, relies upon *Mugler v. Kansas*, *supra*. Two other cases cited in the opinion, *Pinellas County v. Brown*, 450 So.2d 240 (Fla. 2nd DCA 1984) and *Pinellas County v. Brown*, 420 So.2d 308 (Fla. 2nd DCA 1982) rely on *Graham v. Estuary Properties*, *supra* which, as shown above, relies directly on *Pennsylvania Coal v. Mahon*, *supra*.

## CONCLUSION

The Respondents' Brief in Opposition contains many incorrect statements of federal law and false descriptions of the facts and record in this case. Only full briefs on the merits of this case can adequately address those factual and legal issues.

This case presents a dilemma which only this Court can resolve. Only this Court can bind the Florida court and all other courts in interpretations of federal constitutional law. The importance of this case has been demonstrated by the many parties appearing as amici curiae and by the U.S. Attorney General's issuance of Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, referred to in the Amici Briefs. The Solicitor General should be invited to make an appearance to address the position of the United States, particularly on behalf of the USDA and of other federal agencies administering health and safety regulations.

This Court should find that it has jurisdiction in this case and allow the parties to submit briefs on the merits of this most important issue.

Respectfully submitted,

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# **APPENDIX**



**EXCERPT FROM RESPONDENTS' BRIEF  
BEFORE SUPREME COURT OF FLORIDA**

**ISSUE FOR REVIEW**

**WHETHER THE STATE MUST CONSTITUTIONALLY PAY JUST COMPENSATION FOR SUMMARY DESTRUCTION OF SUSPECT CITRUS PLANTS LATER SHOWN TO BE HEALTHY?**

**ARGUMENT**

The Department contends that valid exercise of its police power precludes an inverse taking. This is not the law as the Second District opinion thoroughly explains. Moreover, the Supreme Court of the United States in Case No. 85-1199, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, just decided on June 9, 1987, \_\_\_\_\_ U.S. \_\_\_\_\_, \_\_\_\_\_ S.Ct. \_\_\_\_\_ at Slip Op. at p.9, reiterates:

“The basic understanding of the (fifth) Amendment makes clear that it is designed not to limit the governmental interference with property rights per se but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.”

See also *Loretto v. Teleprompter Manhattan T.V. Corp.*, 458 U.S. 415, 425, 102 S.Ct. 3164, 3170 (1982) (a taking may occur and suit for inverse condemnation proceed even if governmental action depriving Plaintiff of property was a valid exercise of police power); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 648-49, 101 S.Ct. 1087 (1981) (dissenting Op. of J. Brennan.<sup>2</sup>

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<sup>2</sup> Justice Brennan's dissenting opinion to the Court's refusal to accept jurisdiction in *San Diego Gas* was cited with approval by the majority opinion in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, *supra*, Slip Op. at pp. 10 & 11.



“[I]n *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1961), . . . the Court cautioned: ‘That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.’ *Id.*, at 594, 8 L.Ed.2d 130, 82 S.Ct. 987. On many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment “taking.” See, e.g., *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 83, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, [450 U.S. 649] 174, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 2 L.Ed.2d 1228, 78 S.Ct. 1097 (1958).

See also *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984) (settled proposition that a regulation may meet standards necessary for the exercise of the police power but still result in a taking).

